Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Petitioners,

VS.

WASTE CONTROL SPECIALISTS, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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103pp

QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE COURT OF APPEALS TO CONCLUDE THAT REMOVAL WAS INAPPROPRIATE ON THE GROUND THAT "ARTFUL PLEADING" REMOVAL CAN ONLY BE PROPER IN CASES INVOLVING COMPLETE PREEMPTION OF STATE LAW?

II. WAS IT ERROR FOR THE COURT OF APPEALS TO VACATE THE DISTRICT COURT'S 12(b)(6) DISMISSAL OF PLAINTIFF-RESPONDENT'S CLAIMS ON THE GROUND THAT THE CASE HAD BEEN IMPROPERLY REMOVED, NOTWITHSTANDING THAT PLAINTIFF-RESPONDENT, AFTER REMOVAL, AMENDED ITS PLEADING TO (a) SEEK DAMAGES UNDER THE FEDERAL SHERMAN AND CLAYTON ANTITRUST ACTS AND (b) AFFIRMATIVELY PLEAD THE EXISTENCE OF FEDERAL COURT JURISDICTION BASED ON NUMEROUS FEDERAL JURISDICTIONAL STATUTES?

III. WAS IT ERROR FOR THE COURT OF APPEALS TO HOLD THAT THE DISTRICT COURT LACKED JURISDICTION TO ENTER JUDGMENT, ON THE GROUND THAT THE CASE HAD BEEN IMPROPERLY REMOVED, NOTWITHSTANDING THAT THE EFFECTIVE PLEADING AT THE TIME OF JUDGMENT WAS ONE THAT SOUGHT RELIEF UNDER FEDERAL LAW AND PLED THE EXISTENCE OF FEDERAL JURISDICTION?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners Envirocare of Texas, Inc., Envirocare of Utah, Inc., Khosrow B. Semnani, Charles A. Judd, and Frank C. Thorley certify the following disclosure statement:

> Envirocare of Texas, Inc. (shareholders Khosrow B. Semnani and Charles A. Judd)
>
> Envirocare of Utah, Inc.(sole shareholder Khosrow B. Semnani)

There is no parent of either company. No publicly held company owns either of the companies' stock.

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OPINIONS BELOW

The initial opinion of the Court of Appeals (App. A, 1a-13a) is reported at *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781 (5th Cir. 2000).

The amended opinion of the Court of Appeals (App. E, 60a-61a) is reported at *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 207 F.3d 225 (5th Cir. 2000).

The opinions of the District Court (App. B-D, 14a-59a) are unreported.

BASIS FOR JURISDICTION

The initial opinion and judgment of the United States Court of Appeals for the Fifth Circuit reversing the decision of the District Court of the Western District of Texas were filed on January 18, 2000. App. A, F. The final judgment of the Court of Appeals, granting Petitioners' petition for panel rehearing and denying Petitioners' petition for rehearing en banc, was filed on March 15, 2000. App. E. This petition for a writ of certiorari is filed within 90 days of the latter date. 28 U.S.C. section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. section 4. Jurisdiction of courts; duty of United States attorneys; procedure:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

15 U.S.C. section 15. Suits by persons injured:

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any

shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section –

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

15 U.S.C. section 26. Injunctive relief for private parties; exception; costs:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or

association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

28 U.S.C. section 1331. Federal question:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. section 1337. Commerce and antitrust regulations; amount in controversy, costs:

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 11706 or 14706 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11706 or 14706 of title 49, originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title.

28 U.S.C. section 1367. Supplemental jurisdiction:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. section 1441. Actions removable generally:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such

action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. section 1446(b). Procedure for removal:

....(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in

court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Tex. Bus. & Comm. Code section 15.04. Purpose and Construction:

The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

Rule 12(b)(6), Federal Rules of Civil Procedure. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings:

....**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of

process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

Plaintiff-Respondent Waste Control Specialists ("WCS") sued Defendants-Petitioners Envirocare of Texas, Envirocare of Utah, Semnani, Judd, and Thorley (collectively referred to as "Envirocare") in Texas state court in May 1997. WCS' state court petition alleged violations of the Texas Antitrust Act (Tex. Bus. & Comm. Code sections 15.01 et seq.) as well as various state tort claims. R. 349.

In March 1998, WCS filed in the state court an amended petition, again alleging violations of the Texas Antitrust Act. R. 274. Within 30 days, Envirocare removed the case to the United States District Court for the Western District of Texas. 28 U.S.C. section 1446(b). Removal jurisdiction was based on 28 U.S.C. sections 1331 and 1441. R. 1.

Removal was based on the amended petition's clarification that WCS sought damages pertaining solely to waste disposal

services purchased by the United States government. Envirocare believed that since the Texas Antitrust Act by its terms protects only Texas consumers in the relevant market, and since WCS had for the first time made clear that no such Texas consumer interest was implicated, the case set out in the amended petition did not implicate the Texas Act and must be assessed under the Sherman Act—despite WCS' "artful pleading" of state law only.

WCS' motion for remand was denied and the case proceeded in the District Court. App. C, D.

WCS then amended its pleading by asking for, and receiving, leave to file a "Second Amended Complaint" in the District Court. R. 1367. This pleading no longer contained any claims under the Texas Antitrust Act, but instead contained numerous claims based on the federal Sherman and Clayton antitrust acts. The Second Amended Complaint also unequivocally invoked federal jurisdiction:

> This Court has jurisdiction over the federal antitrust claims pursuant to 15 U.S.C. Sections 4, 15, and 26, and 28 U.S.C. Sections 1331 and 1337. This Court has supplemental jurisdiction over the state tort claim pursuant to 28 U.S.C. Section 1367, in that the stat claim arises out of the same operative facts as the federal claims.

R. 1373.

Discovery had been proceeding all along, with trial set for mid-September 1998. R. 2327-28. WCS was ready for trial by late August 1998, when it stated that discovery had gone on long enough and that "we ARE ready to try this case NOW." R. 2329 (emphasis in original).

Then, on August 31, 1998, the District Court granted Envirocare's motion to dismiss WCS' claims under Rule 12(b)(6). App. B. Envirocare had filed that motion in April

1998, shortly after removal. R. 620. The District Court ruled that WCS' claims, on their face, were barred by the *Noerr-Pennington* doctrine, which immunizes First Amendment petitioning activity from antitrust scrutiny.

WCS appealed, arguing that the District Court acted without jurisdiction (notwithstanding that WCS had pled the existence of such jurisdiction). WCS' argument was based in part on the assertion that removal had been inappropriate because the artful pleading doctrine applies only in cases where federal law completely preempts state law.

Envirocare responded that artful pleading removal is not limited to complete-preemption cases. Envirocare also argued that, in any event, WCS had waived or rendered moot its objection to removal when WCS amended its pleading after removal to add Sherman and Clayton Act claims and to invoke federal court jurisdiction.

The Court of Appeals held that removal on artful pleading grounds had been error because this case does not involve complete federal preemption of state law. The Court of Appeals interpreted this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) as dramatically changing the law in this area. According to the Court of Appeals, *Rivet* holds that it is inappropriate to remove a case on "artful pleading" grounds unless it is one of the narrow class of cases involving complete federal preemption of state law.

Petitioners contend that the Court of Appeals mis-interpreted *Rivet*, and that this Court should clarify the meaning of *Rivet* on this point.

The Court of Appeals also ruled that WCS had not waived or rendered moot its objection to federal jurisdiction despite its post-removal filing of a Second Amended Complaint asserting federal claims and federal jurisdiction. The Court of Appeals' decision is flatly contrary to this Court's unanimous

decision in *Caterpillar v. Lewis*, 519 U.S. 61 (1996), wherein this Court held:

> We hold that a District Court's error in failing to remand a case improperly removed is not fatal to the *ensuing* adjudication if federal jurisdictional requirements are met at the time judgment is entered.

519 U.S. at 64.

This Court should correct the Court of Appeals' error, and should resolve the conflict that currently exists in the Circuit Courts regarding whether a post-removal assertion of federal claims cures an improper removal and furnishes the District Court with jurisdiction, even if the District Court's ensuing adjudication is in the form of an order granting a motion to dismiss.

On March 15, 2000, the Court of Appeals denied Envirocare's petition for rehearing en banc and granted Envirocare's motion for rehearing concerning assessment of fees and costs under 28 U.S.C. section 1447(c). Envirocare has filed its petition for writ of certiorari within 90 days of that date.

REASONS FOR GRANTING THE WRIT

I. The court below erred by holding that removal on "artful pleading" grounds can never be proper unless the case involves complete federal pre-emption of state law.

There is a conflict in the lower courts on the question of whether this Court's decision in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) re-wrote the law of "artful pleading" removal.[1] The court below read *Rivet* to mean that

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[1] "Artful pleading" in this context refers to an exception to the "well-pleaded complaint" rule, *i.e.*, a state court plaintiff may not avoid removal

removal on artful pleading grounds is now improper in all cases except those involving complete preemption of state law. Other courts, and noted commentators, take a different position.

If the Court of Appeals' view of *Rivet*'s effect is correct, then decades of contrary case law will have been written out of existence. Traditionally, as noted commentators have observed, the law has been that federal jurisdiction is proper despite artful pleading in at least two categories of cases other than cases involving complete preemption, including suits requiring adjudication of a federal issue. A. Miller, "Artful Pleading: A Doctrine in Search of Definition," 76 Texas L. Rev. 1781, 1784 (1998); 14B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* section 3722 at 436-45 (1998).

The court below interpreted certain language in *Rivet* as effecting a fundamental change in the law, even though this Court in *Rivet* did not say that such was the Court's intention and even though, just a few years earlier, this Court had stated that "*one* corollary of the well-pleaded complaint rule" is complete preemption—not "the only" corollary. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (emphasis added).

The Court of Appeals, having inferred that this Court in *Rivet* meant to transform the law despite *Rivet*'s silence on the subject, then proceeded to implement its interpretation of *Rivet*. And so it held, based on *Rivet*, that "[w]ithout complete preemption, the artful pleading doctrine does not apply." *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 783 (5th Cir. 2000) (App. 4a). On that basis, the Court of Appeals concluded that this case should not have been removed, and thus vacated a Rule

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by "artfully pleading," in state law terms only, a case that is truly federal in nature.

12(b)(6) dismissal with which the Court of Appeals expressed no disagreement whatsoever.

The Court of Appeals' interpretation of *Rivet* is wrong, and should now be corrected. It is contrary to the many cases establishing the propriety of federal jurisdiction—outside of the complete-preemption context—where a plaintiff's case involves federal issues even though plaintiff has pled its case in state law terms only.[2]

Citing Supreme Court precedent, Professor Wright's treatise discusses and rejects the notion that *Rivet* should be read to limit artful pleading removal to cases arising in the complete-preemption context. The treatise notes while a few cases have reached this conclusion, "the view these cases express hardly can be considered very well established." 14B Wright, Miller & Cooper, *supra*, section 3722 at 445 (1998).

Professor Wright's treatise notes the confusion in the lower courts over the meaning of *Rivet*. It states that removal on "artful pleading" grounds has long been deemed appropriate

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[2] *See, e.g., Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Many such cases arose in the same context as the present case: where removal was upheld on artful pleading grounds even though the state court antitrust plaintiff had sought to assert only claims based on state antitrust law, and where preemption was not at issue. *See, e.g., In re NASDAQ Market-Makers Antitrust Litigation*, 929 F. Supp. 174 (S.D.N.Y. 1996) (state case purportedly based on state antitrust law could be removed under artful pleading doctrine; no preemption involved); *Mechanical Rubber & Supply Co. v. American Saw & Manuf. Co.*, 747 F. Supp. 1292, *vacated in part on other grounds*, 810 F. Supp. 986 (C.D. Ill. 1990) (same); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 1987-1 Trade Cases (CCH) ¶ 67,453 (D. Mass. 1986), *vacated and remanded on other grounds*, 834 F.2d 208 (1st Cir. 1987) (same); *Buchanan v. Delaware Valley News*, 571 F. Supp. 868 (E.D. Pa. 1983) (same); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980) (same); *Three J Farms, Inc. v. Alton Box Board Co.*, 1979-1 Trade Cases (CCH) ¶ 62,423 (D.S.C. 1978) (same); *Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F. Supp. 176 (N.D.N.Y. 1964) (same).

in not one but "three distinct classes of cases," *id.* at 436, but it acknowledges that *Rivet* has raised a question in the lower courts as to whether artful pleading is now limited to complete-preemption cases. *Id.* at 445-47. *See also* Miller, supra, at 1826 (discussing "hint" contained in *Rivet* that some courts have interpreted as limiting artful pleading removal to complete-preemption cases).

Professor Wright's treatise explains why, contrary to the Court of Appeals' opinion, this Court's decision in *Rivet* should not be read as re-writing this entire body of law—even though some language in *Rivet* might give some credence to a contrary view. The treatise deems it "extremely unlikely" that *Rivet* means what the Court of Appeals' opinion says it means—that in any non-complete-preemption case, a plaintiff may engage in "artful pleading" and a federal court that might wish to expose the charade will be powerless to do so. 14B Wright, Miller & Cooper, *supra*, section 3722 at 447. *See also* Miller, supra, at 1826-27 (rejecting view that Court in *Rivet* intended to silently overrule prior case law and restrict artful pleading removal to complete-preemption cases only).

As noted above, if the view expressed by the Court of Appeals is in fact correct, then the countless cases upholding removal on artful pleading grounds outside the complete-preemption context have now been overruled. But, as Professor Wright's treatise explains, if this Court in *Rivet* had intended such a dramatic shift in the law, it surely would have made this clear. "It simply is implausible that the Court—unanimously—was transmogrifying . . . by silence" the law in this area as stated by, *inter alia*, two prior Supreme Court cases. 14B Wright, Miller & Cooper, *supra*, section 3722 at 447. *See also* Miller, *supra*, at 1827 (deeming it "rather unlikely" that Court in *Rivet* intended to fundamentally alter this area of the law).

Contrary to the Court of Appeals' decision, many post-*Rivet* decisions continue to indicate that artful pleading

removal is not limited to complete-preemption cases.[3] Shortly after the Fifth Circuit's decision in the instant case was issued, for example, the Ninth Circuit took a completely contrary view of *Rivet*'s effect, stating that "artful pleading" removal is not limited to complete-preemption cases but can occur in three separate classes of cases, in keeping with the traditionally held view. *See Arco Environmental Remediation, LLC v. Department of Health and Environmental Quality*, 2000 U.S. App. 11453 at *10-11 (9th Cir. 2000).

But other cases share the view taken by the Court of Appeals here, and now restrict removal in this context to cases involving complete preemption.[4] The result is

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[3] *See, e.g., Desaigoudar v. California Micro Devices Corp.*, 1999 U.S. App. Lexis 1067 (9th Cir. 1999); *Fax Telecommunicaciones, Inc. v. AT&T*, 138 F.3d 479, 486-87 (2d Cir. 1998); *Kobaissi v. American Country Life Ins Co.*, 80 F. Supp. 2d 488 (E.D.Pa. 2000); *Caravanas v. Hall*, 1999 U.S. Dist. Lexis 12741 (E.D. La. 1999); *Reynolds v. Ferguson*, 73 F. Supp. 2d 841, 844 (W.D. Mich. 1999); *Archer v. Arms Technology, Inc.*, 72 F. Supp. 2d 784, 787 (E.D. Mich. 1999); *Lowe v. NASD Regulation, Inc.*, 1999 U.S. Dist. Lexis 19489 (D.D.C. 1999); *Schappel v UICI*, 1999 U.S. Dist. Lexis 19444 (N.D. Tex. 1999); *Mendoza v. Burgos*, 31 F. Supp. 2d 35, 38 (D.P.R. 1998); *Temptations, Inc. v. Wager*, 26 F. Supp. 2d 740, 743 (D.N.J. 1998); *Popular Democratic Party v. Commonwealth*, 24 F. Supp. 2d 184, 188-89 (D.P.R. 1998); *Portage County Board of Commissioners v. Akron*, 12 F. Supp. 2d 693, 698 (N.D. Ohio 1998); *Baron v. Strassner*, 7 F. Supp. 2d 871, 873 (S.D. Tex. 1998); *Case v. Webb*, 1998 U.S. Dist. Lexis 21679 (S.D. Fla. 1998); *Westwood Nursing Center v. Haveman*, 1998 U.S. Dist. Lexis 20584 (E.D. Mich. 1998); *Village of Alden v. Cablevision Indus., Inc.*, 1998 U.S. Dist. Lexis 20339 (W.D.N.Y. 1998).

[4] *See, e.g., Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 311-12 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *M. Nahas & Co. v. First National Bank*, 930 F.2d 608, 612 (8th Cir. 1991); *Crooks v. Certified Computer Consultants, Inc.*, 92 F. Supp. 2d 582 (W.D. La. 2000) (following Court of Appeals' decision in the instant case); *XF Enterprises, Inc. v. BASF Corp.*, 1999-2 Trade Cases (CCH) ¶ 72,699 (E.D. Pa. 1999); *Shaw v. TCI/TKR of Northern Kentucky, Inc.*, 67 F. Supp. 2d 712 (W.D. Ky. 1999); *Harris v. Deaconess Health Services Corp.*, 61

uncertainty on the part of courts and litigants on a basic issue of federal jurisdiction.

Indeed, one court has even found support in *Rivet* for the proposition that removal on artful pleading grounds is proper when the state plaintiff has omitted necessary federal claims in order to artificially prevent removal. *Archer v. Arms Technology, Inc.*, 72 F. Supp. 784, 787 (E.D. Mich. 1999). Here, of course, the Court of Appeals read *Rivet* as having exactly the opposite meaning.

It is evident that there is great confusion in the lower courts on this question. This case presents an opportunity for this Court to clarify and settle this area of the law, and to correct the error made by the Court of Appeals.

II. The court below failed to follow *Caterpillar v. Lewis* by holding that a plaintiff's post-improper-removal invocation of federal jurisdiction can never act as a waiver of plaintiff's objection to federal jurisdiction, and can never cure the initial jurisdictional defect, if the District Court happens ultimately to decide the case under Rule 12(b)(6).

The Court of Appeals wasted a District Court adjudication of a federal Constitutional issue on the ground that removal to the District Court had been improper. This was not only highly inefficient, but more importantly it was error, because by the time the District Court issued its judgment it clearly had obtained jurisdiction. Even assuming *arguendo* that jurisdiction was initially lacking, any such defect was cured when WCS, after removal, amended its pleading in a manner that undoubtedly conferred jurisdiction on the federal court.

F. Supp. 2d 889 (E.D. Mo. 1999); *Moubry v. Kreb*, 58 F. Supp. 2d 1041, 1045 (D. Minn. 1999); *Orthotic Sales & Service, Inc. v. La Rosa*, 1998 U.S. Dist. Lexis 12181 (E.D. Pa. 1998).

When a case has been improperly removed and plaintiff's motion for remand has been improperly denied, the ensuing federal court adjudication may not be vacated if, by the time judgment is entered, post-removal events have occurred that confer jurisdiction on the federal court. The lack of federal jurisdiction initially is irrelevant to the validity of the subsequent federal court judgment if federal jurisdiction has come to exist by the time judgment is entered. This rule was established in the Court's unanimous decision in *Caterpillar v. Lewis*, 519 U.S. 61, 64 (1996):

> We hold that a District Court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered.

The Court of Appeals erred in failing to follow that holding, which applies squarely to the facts of this case. Federal jurisdictional requirements had been satisfied as of the time of the District Court's judgment because WCS, after removal, filed an amended pleading that invoked federal law and federal jurisdiction in the plainest possible terms:

> This Court has jurisdiction over the federal antitrust claims pursuant to 15 U.S.C. Sections 4, 15, and 26, and 28 U.S.C. Sections 1331 and 1337. This Court has supplemental jurisdiction over the state tort claim pursuant to 28 U.S.C. Section 1367, in that the state claim arises out of the same operative facts as the federal claims.

R. 1373.

But after the District Court dismissed WCS' claims, WCS argued to the Fifth Circuit that the very federal jurisdiction that WCS had expressly invoked and relied upon in its Second Amended Complaint did not exist after all, and indeed had never existed. WCS may as well have inserted the words "unless we lose" after the word "jurisdiction" in the

above-quoted pleading. And the Court of Appeals, instead of rejecting this somewhat unseemly and manipulative "now you see it, now you don't" approach to federal court jurisdiction, took the bait.

So it is that the very plaintiff who sought a fortune in damages under the Sherman Act and the Clayton Act, and who sought to press those "federal claims" in federal court under six different sections of the United States Code, and who was so eager to try those claims that it protested even the slightest delay in the District Court's trial date, was able to say—*with success*—that in fact there had never been federal jurisdiction at all.

Of course, had WCS prevailed in federal court, it would have kept quiet about the supposed absence of federal jurisdiction. That is to say that the WCS was given a "no lose" proposition by the Court of Appeals: win the case in the District Court, or lose without consequence since the Court of Appeals will say that none of the federal proceedings meant anything anyway.

The inequity and wastefulness of this outcome is evident. It is terrible policy to allow litigants to play games with the jurisdiction of the federal courts. It is nonsensical to erase a well-reasoned federal court adjudication of a Constitutional issue, entered after plaintiff had pled federal claims and federal jurisdiction, so that the case can be sent to a state court judge who will be asked to assess precisely the same issue already considered and ruled upon in the now-vacated federal court opinion. Justice certainly is not served by any of this. And this outcome cannot possibly be squared with the *Caterpillar* holding.

The Court of Appeals concluded that the District Court did not have jurisdiction at the time of judgment. *Waste Control Specialists*, 199 F.3d at 784 (App. 7a) (District Court order was "issued without jurisdiction"). This cannot possibly be

correct in light of WCS' own pleading, quoted above. If federal jurisdiction was initially lacking, that problem was undoubtedly cured by WCS' subsequent invocation of and reliance upon federal antitrust law and federal jurisdictional statutes.

Indeed, the error made by the Court of Appeals in this case is precisely the same as that made by the Sixth Circuit in *Caterpillar*. There, too, the court had wrongly concluded that the District Court adjudication should be erased because of an improper removal. But this Court noted that federal jurisdiction had been created prior to judgment (as in this case), so that "the Sixth Circuit erred in resting its decision on the absence of subject-matter jurisdiction." 519 U.S. at 73. And so it is here.

The Court of Appeals' decision is the product of a strained and erroneous effort to avoid the clear holding of *Caterpillar* and instead to apply a prior decision from the Fifth Circuit, *Kidd v. Southwest Airlines Co.*, 891 F.2d 540 (5th Cir. 1990).

The Court of Appeals, focusing on *Kidd* rather than *Caterpillar*, ruled that a post-removal amendment to assert federal claims and federal jurisdiction cannot waive or moot plaintiff's prior objection to federal jurisdiction unless the District Court's ensuing adjudication happens to have been one that can be classified as "on the merits." *Waste Control Specialists*, 199 F.3d at 785 (App. 7a). But nothing in the *Caterpillar* holding supports such an approach.

The Court of Appeals held that a 12(b)(6) dismissal can never be "on the merits" for purposes of the *Kidd* decision and on that basis held that the District Court's dismissal must be vacated, *Caterpillar* notwithstanding. *Waste Control Specialists*, 199 F.3d at 786 (App. 10a).

In so holding, the Court of Appeals misapplied the law established by this Court in *Caterpillar*. At the very least, there is a conflict in the Circuit Courts as to the proper

outcome when the "ensuing adjudication" to which *Caterpillar* refers is made pursuant to a motion to dismiss. *Compare Barbara v. New York Stock Exchange*, 99 F.3d 49 (2d Cir. 1996) and *Vector Research, Inc. v. Howard & Howard*, 76 F.3d 692 (6th Cir. 1996) (indicating that federal jurisdiction is proper in this context and the ensuing adjudication is valid even though the court decides the case by granting a motion to dismiss) *with Chivas Products Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988), *Kidd*, *supra*, and the instant decision (indicating that federal jurisdiction in this context would be improper, and the ensuing adjudication can be erased, if adjudication is made pursuant to a motion to dismiss).[5]

The Court of Appeals concluded that if the District Court bases its dismissal on Rule 12(b)(6), then the District Court must be deemed to have acted without jurisdiction the entire time and the judgment must be erased. But if the case is decided under some rule other than 12(b)(6) (*e.g.*, Rule 56 or after a trial), then according to the Court of Appeals it is correct to find that plaintiff's amendment waived or mooted its objection to removal, it is correct to conclude that the District Court obtained jurisdiction, and the judgment must not be erased. *Waste Control Specialists*, 199 F.3d at 785-87 (App. 7a-11a). How can precisely the same act—amendment

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[5] In *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525 (8th Cir. 1996), the court upheld the validity of the post-improper-removal adjudication where the District Court's decision, while not based on Rule 12(b)(6), was nonetheless a simple dismissal on a purely legal question. Additional cases from the Fourth, Sixth, Seventh, and Tenth Circuits lend further support to Envirocare's position. *Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998), *cert. denied*, 526 U.S. 1112 (1999); *Aqualon Co. v. Mac Equipment, Inc.*, 149 F.3d 262 (4th Cir. 1998); *Herron v. International Ass'n*, 1998 U.S. App. Lexis 1322 (6th Cir. 1998); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179 (7th Cir. 1984); *Cades v. H&R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 515 U.S. 1103 (1995).

of the complaint post-removal to add federal claims—be waiver (jurisdiction upheld) if the case is later decided under Rule 56 or by trial but not waiver (retroactively stripping jurisdiction) if the case is later decided under Rule 12(b)(6)?

It is inappropriate to rest the waiver/no waiver (and, in the Court of Appeals' view, the jurisdiction/no jurisdiction) determination on the happenstance of what rule the District Court later invokes in ultimately adjudicating the claims. A party's waiver is determined by the party's actions, not the court's. The waiver occurs (and federal jurisdiction is established) when the plaintiff, in Judge Posner's words, "throws in the towel" post-removal to amend its complaint to add claims based expressly on federal law.[6]

Certainly, this Court's holding in *Caterpillar* does not allow for the sort of *post hoc* jurisdiction erasure that appears to be possible under *Kidd*. *Caterpillar*'s simplicity—if jurisdiction exists at the time of judgment, the judgment stands despite initial improper removal—is its virtue.

If the Court of Appeals is correct, and if a bright line exists in this context between Rule 12(b)(6) dismissals and all other forms of adjudication, then Rule 12(b)(6) will be written out of the law in any case where a plaintiff, having lost its motion for remand, then files an amended pleading in federal court, asserting claims grounded in federal law. Any sensible defendant, having read the Court of Appeals' opinion, would conclude that filing a Rule 12(b)(6) motion in such circumstances would be a complete waste of time. Only two things could happen: one, defendant would lose the motion. Two, defendant would win the motion, but that victory would be overturned on appeal on the precedential authority of the Court of Appeals' decision in the instant case.

Why should a perfectly good rule, aimed at conserving judicial resources by disposing of claims that lack merit, be

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[6] *Bernstein v. Lind-Waldock Co.*, 738 F.2d 179, 185 (7th Cir. 1984).

disabled in this way? Why should the same adjudication, based on the same Constitutional grounds, be valid if based one rule but erased if based on another rule—with the added extreme peculiarity that in the latter case the District Court will for some reason be deemed to have acted without jurisdiction the entire time? The purpose of the modern Federal Rules is to avoid this sort of artificiality, so that justice might be done.

Indeed, it is evident that Envirocare, by not ensuring that the District Court's constitutionally based rejection of plaintiff's claims was grounded in Rule 56 rather than Rule 12(b)(6), has been placed by the Court of Appeals' opinion into precisely the sort of "procedural booby trap"[7]—having only to do with form, having nothing to do with substance, or merit, or justice—that the modern Federal Rules seek first and foremost to abolish.

There is no doubt that the Court of Appeals was wrong to conclude that the District Court lacked jurisdiction at the time judgment was entered and on that basis to vacate the judgment. *Waste Control Specialists*, 199 F.3d at 783-84 (App. 3a-7a). The Court of Appeals may have believed that federal jurisdiction was lacking *at the time of removal.* But that does not necessarily mean that the District Court lacked jurisdiction *at the time of judgment.*

Caterpillar makes it abundantly clear that these are two different issues. More importantly, as noted above, *Caterpillar* holds that a District Court judgment may *not* be cast aside—even if there was no jurisdiction at the time of removal—if subsequent events in federal court confer such jurisdiction and thus moot the initial jurisdictional defect.[8]

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[7] *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

[8] 519 U.S. at 64. Indeed, within days of the initial opinion in this case, a different panel of the Fifth Circuit, following *Caterpillar*, made clear that an initial jurisdictional defect, resulting from improper removal, can

It bears emphasis that this Court so ruled notwithstanding that plaintiff in *Caterpillar* had filed a timely motion for remand and that such motion was, in the view of this Court, erroneously denied by the District Court. This Court held that these factors—which it may be assumed are also present here—were trumped by "overriding consideration[s] . . . of finality, efficiency, and economy"—which this Court deemed "overwhelming." 519 U.S. at 75. Precisely the same can be said here.

Thus it is impossible to square the Court of Appeals' opinion with the following admonition by the Court in *Caterpillar*:

> To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.[9]

The Court of Appeals said that the "overriding considerations" upon which *Caterpillar* was based were "arguably . . . not implicated" (*Waste Control Specialists*, 199 F.3d at 785 n.2) (App. 8a) because the instant case, unlike *Caterpillar*, is not a diversity case. The Court of Appeals reasoned that wastefulness is a concern in diversity cases because the federal court judgment at risk of being wasted is one that applied state law just as the state court would have. But surely it is clear that the same may be said here (indeed with greater force): that the federal District Court would assess the First Amendment principles underlying the *Noerr-Pennington* doctrine in the same manner as would the state court. If the judiciary is properly reluctant to waste a District Court decision applying state law in a diversity case, then

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be cured by post-removal events. *Engler v. Winfrey*, 201 F.3d 680, 686 (5th Cir. 2000) (*per curiam*).

[9] 519 U.S. at 77.

should it not be even more hesitant to waste a District Court decision applying federal Constitutional law?

This Court should inform the lower courts that *Caterpillar* is indeed the law and that the sort of analysis engaged in by the Court of Appeals in this case is inappropriate.

Moreover, even assuming that *Kidd*'s "on the merits" requirement has any meaning after *Caterpillar*, the court below was wrong to conclude that a Rule 12(b)(6) dismissal can never act as a decision "on the merits."

The heart of the Court of Appeals' opinion is found at 199 F.3d at 786-87 (App. 9a-11a). There the court said that WCS' filing of federal claims had not waived or mooted WCS' objection to federal jurisdiction. The court based this conclusion on the fact that the District Court's judgment was made pursuant to Rule 12(b)(6).

Applying *Kidd*'s "on the merits" language, the Court of Appeals said that the "on the merits" requirement cannot possibly be met by a 12(b)(6) order: "Though the reach of the expression 'trial on the merits' is unclear in this context, we hold that it stops short of a Rule 12(b)(6) dismissal." *Waste Control Specialists*, 199 F.3d at 786 (App. 9a-10a).

The 12(b)(6) dismissal here was based on the District Court's application of an immunity doctrine founded on the First Amendment, as embodied in the *Noerr-Pennington* doctrine. This case is not about some technical pleading deficiency. Even assuming the Fifth Circuit's *Kidd* analysis survives after *Caterpillar*, whatever *Kidd* means by "on the merits" must surely be satisfied by a District Court's decision that a claim cannot be stated because it is barred by the United States Constitution.

Moreover, the dismissal in this case could just as easily have been made under Rule 56 instead of Rule 12(b)(6)—in fact, *more* easily, since Rule 12(b)(6) is the far more lenient

test. *According to the Court of Appeals, this would have made all the difference.* Had this occurred, the District Court's judgment would stand because the Court of Appeals would have viewed it as "on the merits" adjudication—which, according to the Court of Appeals, is the crucial question. *See Waste Control Specialists*, 199 F.3d at 786 (App. 10a) (summary judgment would be "on the merits" for purposes of *Kidd*).

It is ironic that because the District Court was able to dispose of WCS' claims even when giving WCS the benefit of the pro-plaintiff bias embodied in Rule 12(b)(6)—and thus did not even need to assess factual material (as under Rule 56) to conclude that the First Amendment barred WCS' claims—that this very fact is what enabled the Court of Appeals to conclude that the District Court's decision could be erased (when a Rule 56 adjudication could not be erased).

The illogic is rooted in the Court of Appeals' insistence on an "on the merits" adjudication, and its further insistence that a decision pursuant to Rule 12(b)(6) can never qualify. The Court of Appeals said that "[w]ithout any factual review as applied to the plaintiff's allegations, the 'merits' of a plaintiff's case have not been sufficiently addressed for purposes of this [*Kidd*] issue." 199 F.3d 786-87 (App. 10a). Clearly the Court of Appeals was saying that had WCS' pleading just been a bit stronger—so that the District Court would not have been able to reject the case without assessing facts under Rule 56—then the "on the merits" requirement would have been satisfied and the District Court's judgment would stand. It is a perverse rule of law that makes a District Court's dismissal of a weaker case more vulnerable than its dismissal of a stronger one.

The Court of Appeals' message is as unfortunate as it is clear. Any future District Court in the Fifth Circuit that wishes to protect its judgment in this context should not save judicial resources by dismissing a facially invalid claim under

Rule 12(b)(6). Instead, it should go through the entirely meaningless and wasteful exercise of performing the Court of Appeals' requisite "factual review"—so that the District Court's adjudication will receive the all-important "on the merits" label, and thus will not subject to erasure under *Kidd*. Fifth Circuit litigants are encouraged to play the "factual review/on the merits" game too: dismissal in this context should now be sought exclusively via a motion for summary judgment, even if plaintiff's claim could be more efficiently disposed of without any evidentiary review under Rule 12(b)(6). Moving under Rule 12(b)(6) in this context simply leads to the *Waste Control Specialists v. Envirocare* trap.

It makes no sense to waste a District Court assessment of a federal Constitutional issue on the ground that the court acted under one rule rather than another. Nor does it make sense to give the plaintiff a brand new opportunity in state court on the ground that its pleading failed even the most lenient test available under the Federal Rules (Rule 12(b)(6)) when such an opportunity would not be made available had a more rigorous test been applied (Rule 56). Nor does it make sense to force District Courts and litigants to avoid the use of a rule that heretofore has proven to be an efficient mechanism for the prompt adjudication of facially invalid claims.

This Court should not let stand the flawed reasoning embodied in the Court of Appeals' opinion.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to reverse the Court of Appeals' decision.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jan. 18, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50952

WASTE CONTROL SPECIALISTS, LLC,
Plaintiff-Appellant,

versus

ENVIROCARE OF TEXAS, INC.; *et al.*,
Defendants,

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, Midland

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges:

The issues presented in this appeal are, first, whether the district court erred in failing to remand this antitrust and business tort case to the state court by concluding that the complaint fell within the artful pleading doctrine and, second, whether the plaintiff waived its right to challenge federal jurisdiction because, after its efforts to remand had failed, it amended its complaint to state a federal claim.

I

The dispute between the appellant, Waste Control Specialists, L.L.C. ("WCS"), and the appellees, Envirocare of Texas, Inc., *et al.* (collectively, "Envirocare"), revolves

around WCS's bid to enter the market for disposal of low-level radioactive and mixed waste.

WCS brought this suit against Envirocare in Texas state court alleging that "Envirocare conceived and implemented a plan to destroy WCS' ability to compete in the low-level radioactive and mixed waste business." WCS pled exclusively state law causes of action. They ranged from allegations of violation of the Texas Free Enterprise and Antitrust Act of 1993, Tex. Bus. & Com. Code § 15.05(b) (1987) ("Texas Antitrust Act"), to business tort claims. Specifically, WCS alleged that Envirocare used its monopoly position improperly to prevent WCS from obtaining the approval of the state of Texas for its project. The alleged impropriety turned, first, on allegations of false and defamatory communications to state regulatory officials regarding the WCS project. Second, WCS charged that Envirocare engaged in a sham effort to create a competing facility in Andrews County, Texas. WCS alleged that the sole purpose of this effort in Andrews County was to incite a backlash against WCS based on citizen fear of that county becoming a toxic dumping ground. Naturally, Envirocare denied those allegations. Additionally, Envirocare raised the *Noerr-Pennington* affirmative defense, i.e., that these activities were immune from suit because efforts to influence public officials cannot violate antitrust laws.

Ten months after filing its original state petition, WCS filed an amended petition, apparently restricting its allegations to the non-commercial waste market—a market with only one consumer of disposal services, i.e., the only generator of non-commercial waste, the United States Department of Energy. At that point, Envirocare removed the action to federal district court. It asserted that, because the only customer for noncommercial waste market is the federal government, the single viable claim propounded by WCS must be based on federal antitrust law, notwithstanding that WCS's complaint made no reference to any federal law.

The district court agreed and, asserting the artful pleading doctrine, denied WCS's motion to remand. In filing its motion to remand, WCS objected strenuously to what it considered Envirocare's improper removal. It also filed a motion to reconsider the order denying remand. After its unsuccessful efforts to have the case remanded, WCS faced Envirocare's motion to dismiss. The district court strongly suggested that WCS's only potentially viable claim was a federal one. Accordingly, WCS amended its complaint expressly to allege a violation of the Sherman Act. Despite this amendment, on Envirocare's Fed. R. Civ. P. 12(b)(6) motion, the district court dismissed WCS's complaint, reasoning that Envirocare's activities were protected under the *Noerr-Pennington* doctrine.[1]

II

We review *de novo* denials of motions to remand. *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362,

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[1] We have explained this doctrine as follows:

> The *Noerr-Pennington* doctrine "allows individuals or businesses to petition the government, free of the threat, of antitrust liability, for action that may have anti-competitive consequences. *Noerr-Pennington* protection is grounded on the theory that the right to petition guaranteed by the First Amendment extends to petitions for selfish, even anticompetitive ends." *Greenwood Utilities Comm'n v. Mississippi Power* Co., 751 F.2d 1484, 1497 (5th Cir 1985). The doctrine was announced in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), where the Supreme Court held that the Sherman Anti-Trust Act did not bar an association of railroad companies from seeking legislation and regulations destructive of the trucking industry. The Court has expanded this holding to encompass the petitioning of other public officials besides legislators. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Real Estate Investors v. Columbia Pictures*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993).

Brown & Root, Inc. v. Louisiana State AFL-CIO, 10 F.3d 316, 325 (5th Cir. 1994).

365 (5th Cir. 1995). The district court rejected WCS's motion to remand on the basis that the artful pleading doctrine applied. The court reached this conclusion notwithstanding the fact that the Sherman Act does not completely preempt the Texas Antitrust Act. The district court recognized that WCS's claim under the Texas Antitrust Act was not one subject to complete federal preemption. Indeed, the district court explicitly noted that federal antitrust law does not preempt Texas' antitrust law. *See Pounds Photographic Labs, Inc. v. Noritsu America Corp.*, 818 F.2d 1219, 1226 (5th Cir. 1987). The district court held, however, that the Texas Antitrust Act was not applicable on the facts. The district court interpreted the Texas Act not to apply to actions that are wholly interstate in nature, and it found that WCS could not establish a Texas antitrust action because of the wholly interstate, or non-intrastate, nature of the federal government's waste disposal market. Although not expressly saying so, the district court's order clearly hinted that WCS's only possible claim was a federal one. Indeed, in a footnote, the order states that it "does not address the merits of the Plaintiff's federal antitrust claim," although WCS had not alleged that cause of action. Based on this conclusion that a federal claim effectively had been alleged, the court decided that it had subject matter jurisdiction.

The district court's decision regarding the viability of WCS's allegations appears to have been one the district court had no jurisdiction to make. Without complete preemption, the artful pleading doctrine does not apply. If this was once a matter of debate, the Supreme Court recently has put the issue to rest. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S.Ct. 921, 925 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim. . . . Although federal preemption is ordinarily a defense, once an area of state law has been completely considered, any claim purportedly based on that pre-empted state law claim is considered, from its inception, a

federal claim, and therefore arises under federal law.") (citations and internal quotation marks omitted). *See also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 397 n.11 (1987) ("Although 'occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization, most [courts] correctly confine this practice to areas of the law pre-empted by federal substantive law.") (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 410 (1981) (Brennan, J., dissenting)). Indeed, even prior to *Rivet*, this was the rule in this circuit and others. *See Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) ("[W]hen both federal and state remedies are available, plaintiff's election to proceed exclusively under state law does not give rise to federal jurisdiction. In the present case, there is no doubt that Appellees have chosen to pursue only state law causes of action. . . . The district court had no jurisdiction over the subject matter . . . ."). *See also* James W. Moore, MOORE'S FEDERAL PRACTICE § 107.14[3] [b] [iv], p. 107.86.2-86.3 & n.184.1 (3d ed. 1999) (citing cases from the Third, Eighth, and Ninth Circuits, but noting some authority to the contrary).

The district court's error, perhaps, lies in overreliance on *Carpenter, supra*, 44 F.3d 362. The district court's adoption of language in *Carpenter* to support its holding that the artful pleading doctrine could apply irrespective of the lack of complete preemption does not take into account the full reach of the case's language or holding. For instance, the district court focused on a statement in *Carpenter* that, "[t]he artful pleading doctrine recognizes that the characterization of a federal claim as a state claim will not in all cases prohibit removal when the plaintiff has no state claim at all." *Id.* at 367. That quote must be read in context. First, *Carpenter* expressly stated:

> In certain situations where the plaintiff necessarily has available no legitimate or viable state cause of action,

> but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising. exclusively under state law. Although a defense, preemption may so forcibly *and completely* displace state law that the plaintiff's cause of action is either wholly federal or nothing at all.

Id. at 366 (emphasis added) (citing *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 559 (1968)). Indeed, the district court did not note the next sentence and citation.

> The doctrine does not convert legitimate state claims into federal ones, but rather reveals the suit's necessary federal character. *See Franchise Tax Board* [*v. Construction Laborers Vacation Trust*], 463 U.S. [1,] 23 [(1983)] (announcing that this exception to the well-pleaded complaint rule "stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.").

Carpenter specifically noted that the artful pleading doctrine is a "narrow exception," *id.* at 367, to the well-pleaded complaint rule, and that "[t]he Supreme Court has required that the preemption be complete." *Id.* at n.2 (citations omitted). Finally, *Carpenter* observed that "the Supreme Court has clearly sanctioned the [artful pleading] rule only in the area of federal labor relations and the Employee Retirement Income Security Act of 1974. . . ." *Id.*

In this circumstance, WCS remained the master of its complaint. *See Avitts*, 53 F.3d at 693. Although WCS *could* have alleged a federal cause of action in its state petition, it did not. It filed a complaint in state court alleging wholly state claims in a non-preempted field. Its choice is entitled to respect and precluded removing the case to federal court absent circumstances not presented here. For certain, we

express no opinion as to the viability of WCS's state law claims. That is for a Texas court to decide. The district court's order, issued without jurisdiction, can have no preclusive effect.

III

Despite improper removal and the district court's error in denying WCS's motion to remand, we must nevertheless confront whether WCS's decision to amend its complaint in federal court to state a claim under the Sherman Act waived this jurisdictional defect.

Jurisdictional defects at time of removal notwithstanding, a final judgment of a federal court may be binding even though the case has been improperly removed, if jurisdiction exists at the time judgment is entered. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 73 (1996) ("[E]rroneous removal need not cause the destruction of a final judgment, if the requirements of federal subject-matter jurisdiction are met at the time the judgment is entered."); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972); *Kidd v. Southwest Airlines, Co.*, 891 F.2d 540, 547 (5th Cir. 1990).

To be binding despite improper removal, the plaintiff must voluntarily amend its complaint, and there must be a final judgment on the merits. *See Kidd*, 891 F.2d at 546. According to *Kidd*:

> Where the disgruntled party takes full advantage of the federal forum and then objects to removal only after losing at the district court level, that party has waived all objections to removal jurisdiction. Although Kidd initially protested the district court's removal jurisdiction, we find that Kidd's voluntary decision to amend her complaint after the district court denied her motion for remand waived this objection.

Id. (citations omitted). We must decide whether *Kidd* controls our decision today.

Post-*Kidd*, the Supreme Court has looked favorably upon a

plaintiff's argument that diligent objection renders the waiver doctrine inapplicable. *See Caterpillar*, 519 U.S. at 72-77. The *Caterpillar* Court expressly distinguished *Grubbs, supra*, 405 U.S. at 702, on the basis that it addressed jurisdiction after removal without objection. "The [*Grubbs*] decision is not dispositive of the question whether a plaintiff, who timely objects to removal, may later successfully challenge an adverse judgment on the ground that the removal did not comply with statutory prescriptions." *Caterpillar*, 519 U.S. at 73. The Court noted that the plaintiff, "by timely moving for remand, did all that was required to preserve his objection to removal," *id.* at 74, and held that a plaintiff in this predicament need not seek permission for a 28 U.S.C. § 1292(b) interlocutory appeal in order to preserve the error. *Id.* Despite this favorable language, the Court ultimately upheld the federal court judgment on the basis that "[o]nce a diversity case has been tried in federal court . . . considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75.[2] Thus, *Caterpillar* holds that timely objection can preserve the jurisdictional claim despite subsequent amendment, even if other considerations may ultimately outweigh that objection. *See also Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1145-46 (8th Cir. 1992) (distinguishing *Grubbs* on the basis that plaintiff failed to object to removal); *Paxton v. Weaver*, 553 F.2d 936, 941-42 (5th Cir. 1977). Because *Grubbs* holds that it is only the non-objecting plaintiff who definitively waives its jurisdictional

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[2] The Court further stressed that " [t]o wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77. Here, that concern arguably is not implicated. A diversity case differs fundamentally from a federal question case. With a diversity case, a federal court applies state law exactly as would a state court. *See e.g., Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). There is no difference in the treatment of the substance of plaintiff's claims; the change is largely procedural if at all.

argument, *Grubbs* is not applicable.

We also think that there has been no waiver here for at least one other reason. Applying the *Kidd* elements, in deciding that waiver is not applicable to WCS, we are greatly influenced because there was no trial on the merits.[3] Though

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[3] WCS also objects that its amendment was not voluntary, citing *Humphrey v. Seguentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995), a case in which the district court had found the plaintiff's state law claim to be preempted. "Thus, the district court presented [the plaintiff] with a Hobson's choice. Under the circumstances, his options were to amend his complaint to allege the federal LMRA claims or risk dismissal of the complaint and, consequently, preclusion of his federal claims under the doctrine of res judicata." *Id.* at 1241. We note that a similar Hobson's choice argument has not been uniformly accepted. In *Bernstein v. Lind-Waldock Co.*, 738 F.2d 179, 185 (7th Cir. 1984), Judge Posner persuasively wrote:

> [A]fter Bernstein's motion to remand was denied, he threw in the towel, as it were, and filed an amended complaint in federal court that included an unmistakable federal cause of action against the Exchange. The amended complaint was thus within the original jurisdiction of the federal district courts and it makes no difference that it was filed only because Bernstein's previous suit had improperly been removed. If he was convinced that the original action was not removable he could have stuck by his guns and we would have vindicated his position on appeal. But once he decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there. Otherwise he would be in a position where if he won his case on the merits in federal court he could claim to have raised the federal question in his amended complaint voluntarily, and if lost he could claim to have raised it involuntarily and to be entitled to start over in state court. He 'cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses.'

(Citing *Brough v. United Steelworkers of America*, 437 F.2d 748, 750 (1st Cir. 1971)). In *Sigmon, supra*, 110 F.3d at 1202-03, we cited this language favorably but without discussion. *Bernstein*, though not *Sigmon*, precedes, *Caterpillar's* apparent approval of the plaintiff's effort to do "all that was required to preserve his objection to removal." 519 U.S. at 74. As we have noted, *Caterpillar* preserves for appeal objection to jurisdiction if timely objected to in the first place, and in the absence of other equitable

the reach of the expression "trial on the merits" is unclear in this context, we hold that it stops short of a Rule 12 (b)(6) dismissal. Although we have defined this phrase to include summary judgments, *see Kidd*, 891 F.2d at 546; *Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200, 1202 n.6 (5th Cir. 1996), we have not gone further than that. On the same question, sister circuits have expressly held that a "trial on the merits" does not include 12(b)(6) dismissals. *See e.g., Chivas Products, Ltd. v. Owen*, 864 F.2d 1280, 1286-87 (6th Cir. 1988) (citing cases from the Fourth, Fifth, Ninth, and Eleventh Circuits), *rev'd on other grounds, Tafflin v. Levitt*, 493 U.S. 455 (1990). In *Kidd*, we stated that "the 'trial on the merits' requirement comprehends a full bench or jury trial, as well as a summary judgment dismissal." 891 F.2d at 546 (citation omitted). This statement is in accord with the usual rule. *See e.g., Bennett v. Pippin*, 74 F.3d 578, 585 (5th Cir. 1996) (differentiating summary judgments with Rule 12 (b)(6) motions); Wright & Miller, 5A Federal Practice & Procedure: Civil 2d § 1356 (West 1990) ("The purpose of a motion under Rule 12 (b)(6) is to test the formal sufficiency of the statement of the claim; it is not a procedure for resolving a contest about the facts or the merits of the case."). To be sure, the usual course of action upon granting a defendant's Rule 12 (b)(6) motion is to allow a plaintiff to amend his or her complaint, *see Foman v. Davis*, 371 U.S. 178, 182 (1962), which implies that a plaintiff often may still be able to state a claim if pleaded properly. Without any factual review as applied to the plaintiff's allegations, the "merits" of a plaintiff's case have not been sufficiently addressed for purposes of this issue.

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issues. More important, despite its obvious attraction, Judge Posner's language must admit some exception. If it were the firm and fast rule, an amendment of one's complaint after improper removal would always constitute waiver of the argument despite the prerequisite for a judgment on the merits.

One final consideration that influences our decision (which may be said to stem from the fact that there was no judgment on the merits), is the absence here of the "[overwhelming] considerations of finality, efficiency, and economy," which was compelling for the Court in *Caterpillar*. 519 U.S. at 75. This case consumed, relatively, a minimum of judicial resources. No hearing was ever held in this matter. In comparison to the three and one-half years of litigation and six-day jury trial in *Caterpillar*,[4] the district court, in perhaps the overstated words of WCS, granted it, "only eleven days and ten pages to reply to Envirocare's Motion to Dismiss," before it ruled. The few months during which this case improperly resided in federal district court are not comparably overwhelming.

In sum, the doctrine of waiver after improper removal is not applicable on these facts. As WCS timely objected to removal, it has not waived its objection to that removal despite its subsequent amendment of its claim.[5]

IV

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[4] *Caterpillar's* finding of finality, efficiency, and economy considerations was made by analogy to *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), a diversity case in which the "Court stated that "requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Id.* at 836. An apparently expedited Rule 12 (b)(6) decision hardly is of the same magnitude to either case.

[5] We also find merit in WCS's position of the narrowness of its amendment. The company filed an amended complaint to state the one and only claim the district court suggested it had, and a claim that was consistent with its state court pleading. In comparison, in *Kidd*, the plaintiff brought a breach of her employment contract claim in state court. Upon removal to federal court and denial of her motion to remand, plaintiff "amended her complaint to assert breaches of Southwest's employee stock ownership plan and employee profit-sharing plan" under ERISA. 891 F.2d at 542. Thus, the plaintiff added an entirely new cause of action. Such an action speaks to a studied decision to take advantage of the forum once there.

"An order remanding [an improperly removed] case may require payment of just costs and any actual expenses, including attorney fees, incurred as the result of the removal." 28 U.S.C. § 1447(c). Appellant's costs and expenses before this court and the district court were certainly "incurred as the result of the removal." *See Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997). "[O]rdinary litigation expenses that would have been incurred had the action remained in state court are not recoverable. . . ." *Id.* at 32. Moreover, an award of attorney's fees under § 1447(c) for the plaintiff who plays an "active role . . . in persuading the district court to retain jurisdiction" is inappropriate. *Id.* at 33. In this case, however, WCS may be said to have taken an opposite position with respect to jurisdiction, despite its amendment. Furthermore, we are persuaded that WCS's attorney's fees in the district court would not have been incurred had the action remained in state court. After all, the litigation expense incurred in federal court involved efforts to remand the case to state court and, failing that, WCS amendment of its pleadings to state a federal cause of action and subsequent defense of that position against Envirocare's motion to dismiss. It appears to us that WCS would not have incurred these fees if Envirocare had not improperly removed the case. We therefore conclude that WCS is entitled under the statute to the full costs and expenses, including attorney's fees, incurred in defending against the improper removal and all other action in district court.

V

In sum, we hold that this action was improperly removed to district court and that WCS's motion to remand should have been granted. Furthermore, on the facts of this case, WCS did not waive its jurisdictional argument by amending its complaint in the district court to state a federal cause of action under the Sherman Act. WCS's antitrust cause of action may or may not be able to escape dismissal in state court, but that is not for a federal court to decide.

This district court lacked subject matter jurisdiction over this action. Its orders are therefore VACATED, and the case is REMANDED to the district court with instructions to remand this action to the state court from which it was removed in accordance with 28 U.S.C. § 1447(c) and to award costs and fees to WCS upon submission of proper proof.

VACATED and REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-98-CA-62

WASTE CONTROL SPECIALISTS, LLC,
Plaintiff,

v.

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY; BILLY W. CLAYTON; AND NANCY M. MOLLEDA,
Defendants.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, are Defendants' Motion to Dismiss, filed April 20, 1998; Plaintiff's Response to Defendants' Motion to Dismiss, filed May 1, 1998; Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss, filed May 8, 1998; Defendants' Supplemental Memorandum, filed May 20, 1998; Plaintiff's Response to Defendants' Letter Brief, filed May 21, 1998; and Plaintiff's Letter Brief, filed July 8,1998. To fully consider the Defendants' Motion to Dismiss, the Court has also considered the briefs filed regarding Plaintiff's Second Amended Complaint, filed July 20, 1998.[1] After due consideration, the Court is of the opinion that the following Order is appropriate.

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[1] The Plaintiff filed its Motion for Leave of Court to File Plaintiff's Second Amended Complaint on June 29, 1998. Defendants filed a brief in Opposition to Plaintiff's Motion for Leave of Court to File Plaintiff's Second Amended Complaint on July 7, 1998 and Plaintiff filed its Response to Defendants' Opposition to Plaintiff's Motion for Leave to File Plaintiff's Second Amended complaint on July 10, 1998. The court's Order of July 20, 1998, granted Plaintiff's Motion for Leave to file Second Amended Complaint.

I. STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim, the Court may only grant the motion if "it appears beyond doubt that the plaintiffs would not be entitled to recover under any set of facts that they could prove in support of their claim." *Crowe v. Henry,* 43 F.3d 198, 203 (5th Cir.1995) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Defendants in Rule 12(b)(6) motions "admit[] the facts alleged in the complaint, but challenge[] plaintiff's right to relief based upon those facts." *Id.* (quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966)). Therefore this Court accepts as true all factual allegations in the pleadings. *Kansa Reinsurance Co. v. Congressional Mortg. Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994). The Court need not resolve unclear questions of law in favor of the plaintiff. *Id.* Moreover, a successful affirmative defense may also merit dismissal under Rule 12(b)(6). And finally, in order to avoid dismissal, the plaintiff must plead specific facts—not merely conclusory allegations. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1062 (5th Cir. 1994).

II. BACKGROUND

The Plaintiff Waste Control Specialists, LLC ("WCS"), brings the present cause of action against the Defendants Envirocare of Utah, Inc.; Envirocare of Texas, Inc.; Khosrow B. Semnani; Charles A. Judd; and Frank C. Thorley (collectively, "Envirocare"), alleging that the Defendants [2] intentionally interfered with WCS's attempts to obtain lucrative government contracts for the disposal of the Department of Energy's ("DOE") low-level radioactive and

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[2] Plaintiff's Second Amended Complaint, filed July 20, 1998, dismissed Defendants Billy W. Clayton and Nancy M. Molleda from the present cause of action.

mixed wastes.[3] WCS's Second Amended Complaint alleges causes of action (1) for monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) tortious interference with prospective business relations; (3) business defamation; and (4) business disparagement. Taking WCS's factual allegations as true, however, the Defendants claim that WCS has failed to state a cause of action for which relief may be granted and request that the Court dismiss the Plaintiff's case.

A. The DOE Private Disposal Market

At the heart of the instant case are the waste of past days. Plaintiffs Second Amended Complaint sets forth that the DOE oversees the monumental task of disposing radioactive wastes generated by the DOE and its predecessor agencies like the Atomic Energy Commission. *Pl.'s Second Am.*

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[3] Plaintiff's Second Amended Complaint defines low-level radioactive and mixed wastes in the following way:

> DOE 'low-level radioactive waste,' as that term is used in this dispute, includes items that contain or have become contaminated with certain radioactive elements. These elements consist of uranium or thorium as well as other radioactive elements created in nuclear reactions. This waste typically includes such things as contaminated soil, clothing, filters, debris, equipment and tools, as well as tailings from DOE's uranium mining and milling operations, and, in addition, the uranium and thorium-contaminated materials of DOE.

Pl's Second Am. Compl. at ¶16. *See also* 42 U.S.C. §2021b(9) (1994) (defining "low-level radioactive wastes").

> DOE 'mixed waste' . . . . is DOE low-level radioactive waste that also contains 'hazardous' components (as defined by the federal Resource Conservation and Recovery Act) or 'toxic' components (as defined by the federal Toxic Substances Control Act). Approximately 98 percent of all the mixed waste in the U.S. has been generated by DOE.

Pl's Second Am. Compl. at ¶ 17.

Compl. at ¶¶ 13-14. Apparently, the DOE must dispose of nearly one billion cubic feet of low-level radioactive and mixed wastes at taxpayer cost in the tens of billions of dollars. *Id.* Although the DOE maintains its own facilities to dispose of some of the wastes, the DOE has also begun to grant private contracts to disposal facilities that are off-site from where such wastes were generated. *Id.* ¶¶ 19-23.

Since February of 1997, WCS has run a facility in Andrews County, Texas, to store, treat, and dispose of various hazardous and toxic wastes. *Id.* at ¶ 24. The facility operates under license granted by the Texas Natural Resource Conservation Commission (the "TNRCC") and by the United States Environmental Protection Agency. *Id.* at ¶¶ 26-28. Meanwhile, the Defendant Envirocare of Utah, Inc.'s facility, located in Tooele County, Utah, is the only privately-run waste disposal facility in the United States which receives, stores, treats, and disposes of low-level radioactive and mixed wastes from the DOE. *Id.* at ¶¶ 43-45. Defendant Envirocare of Texas, Inc., on the other hand, is an affiliate of the Utah company and has its principal place of business in Andrews County. *Id.* at ¶ 6. Finally, Defendants Khosrow B. Senmani, Charles A. Judd, and Frank C. Thorley are, or have been, officers and owners of Envirocare of Utah, Inc., and Envirocare of Texas, Inc.[4] *Id.* at ¶¶ 7-10.

With an eye towards an obvious potential for profit, WCS beginning around 1995 sought to enter the two relevant

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[4] Defendant Khosrow B. Semnani is the sole owner of Envirocare of Utah, Inc., has been Envirocare's President, and is the president and majority owner of Envirocare of Texas, Inc. Defendant Charles A. Judd has been the Executive Vice President of Envirocare of Utah, Inc., has been President of Envirocare of Utah since May 14, 1997, and is also the Executive Vice President and minority owner of Envirocare of Texas, Inc. Finally, Defendant Frank C. Thorley has been the Regulatory Affairs Manager of Envirocare of Utah and Envirocare of Texas.

markets (the "DOE disposal market") now the subject of the present suit and in which the Envirocare of Utah facility already participates: "(1) the private disposal market for DOE's mixed radioactive waste that must be disposed of off-site; and (2) the private disposal market for DOE's low-level radioactive waste that must be disposed of off-site." *Id.* at ¶ 12. Moreover, WCS points out that the relevant geographic market for disposal of such wastes was "the entire continental United States." *Id.*

B. The WCS Proposal

To enter the highly regulated DOE disposal market, WCS recognized that only "[a]uthorization by DOE to receive DOE low-level radioactive and mixed wastes for disposal would result in WCS' entry into the product market for those wastes." *Id.* ¶ 30. Thus, WCS developed a three-part plan which involved obtaining necessary permits or authorizations from the DOE, the TNRCC, and the Texas Department of Health ("TDH"):

> *First*, from TNRCC, WCS needed permission to amend its Andrews County Facility hazardous waste permit so that the permit would not preclude the receipt of radioactive materials at the facility. TNRCC regulates amendments to hazardous waste disposal permits within the State of Texas. WCS filed the requisite amendment request with TNRCC in March 1996, and that request was granted by TNRCC on July 10, 1996. (*Pl.'s Second Am. Compl.* at ¶ 32)
>
> *Second*, from the [TDH], WCS needed a permit to store and treat low-level radioactive wastes at the Andrews County Facility. TDH regulates the storage and treatment of low-level radioactive wastes within the State of Texas. WCS filed the requisite permit application with TDH in March 1996, and, after months of delay and interference caused by Envirocare and its agents, that permit was granted on November 3, 1997.

(*Id.* at ¶ 33)

Third, WCS needed DOE's authorization to be allowed to compete to receive for disposal DOE's low-level radioactive and mixed wastes. DOE has legal authority over the disposal of its own low-level radioactive and mixed wastes, and can legally authorize WCS for such disposal. WCS began discussions with DOE officials in this regard in late 1995 and continuing into 1996. WCS also began preparing a detailed technical document demonstrating that the Andrews County Facility is geologically safe and environmentally sound for the disposal of low-level radioactive and mixed wastes. (*Id.* at ¶ 34)

The third part of WCS's plan was particularly crucial because WCS realized that "Texas law contains no provisions authorizing licensing by Texas [agencies] of a disposal facility dedicated to the disposal of DOE low-level radioactive and mixed waste." *Id.* at ¶ 35. Thus, in discussions with DOE officials, WCS suggested that the DOE could authorize WCS's disposal of DOE's wastes and utilize the TNRCC to oversee WCS's operations. *Id.* at ¶¶ 36-38. Moreover, in discussions with the TNRCC beginning in the spring and early summer of 1996, TNRCC officials apparently expressed interest in WCS's plans to enter the DOE disposal market. *Id.* at ¶¶ 40-42.

C. The Best Laid Plans . . .

WCS's plans fell through, however, when TNRCC officials eventually withdrew from WCS's oversight plan. *Id.* at ¶ 78. Because of the TNRCC's apparent unwillingness to oversee WCS's disposal facility for low-level radioactive and mixed wastes, the DOE was also "unwilling to proceed to authorize the WCS site for disposal services in the relevant product markets absent TNRCC's participation." *Id.* at ¶ 80.

Consequently, WCS lost the opportunity to compete for various DOE disposal contracts valued in the tens and hundreds of millions of dollars and in fact has estimated that it has lost a "net present value . . . of expected market share in the relevant product markets over the next several years . . . exceed[ing] one billion dollars." *Id.* at ¶¶ 86, 81-84, 134, 138.

In the present cause of action, however, WCS essentially claims that its failure to enter the DOE disposal market was not its fault, and blames the Defendants for the DOE's ultimate unwillingness to authorize WCS for the disposal of its wastes. According to WCS, the Defendants improperly influenced state and federal officials into locking WCS out of the relevant DOE disposal markets. Thus, WCS alleges that the "TNRCC's withdrawal was the proximate result of the illegal actions, misrepresentations, predatory practices, interference, and abuse of monopoly power by Defendants complained of above." *Id.* at ¶ 79.[5]

Specifically, WCS alleges that the Defendants (1) presented false and misleading claims of technical defects and

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[5] Plaintiff also sets forth allegations that the Defendants illegally acquired and illegally maintained their present monopoly over the DOE's waste disposal market. *Id.* at ¶¶ 51-60. However, Plaintiff's allegations in those sections of the Complaint are essentially irrelevant to the Plaintiff's claims against the Defendants because they do not address Defendants' alleged interference with the Plaintiff's present plans to compete in DOE's disposal market. For example, the allegations merely point out that the Defendants bribed *Utah officials* to obtain and maintain their facilities *in Utah* without pointing out how such an action interfered with WCS's present attempts to enter the DOE market by obtaining licenses *in Texas*. *See Id.* at ¶ 54. Moreover, the allegations set forth that the Defendants have falsely advertised the superiority of their disposal services without connecting such misrepresentation to Plaintiff's current attempts to enter the DOE market. *Id.* at ¶ 60. To the extent that the factual allegations in paragraphs 51-60 of the Second Amended Complaint may involve direct interference with the Plaintiff's market entry, however, the Court will consider them.

legal issues to federal and state officials, (2) created environmental groups to push forward bogus technical or environmental concerns, (3) threatened to open up a competing disposal site in close proximity to WCS to create the illusion that Texas was to become a "dumping ground" for nuclear wastes, and (4) threatened to deprive competitors or customers the use of Envirocare's "essential facility" in Utah for their disposal needs or financial assurances requirements. *Id.* at ¶ 62. WCS claims that the Defendants used Texas lobbyists to present false or misleading information about the technical and geological adequacy of the WCS-Andrews site and the impact of WCS's proposal on water resources in West Texas. *Id.* at ¶¶ 63-65, 69. WCS contends that the Defendants' statements were "calculated to incite fears among key government officials that the State of Texas would become a 'dumping ground' for radioactive waste if the authorizations sought by WCS were granted." *Id.* at ¶ 65. Furthermore, WCS notes that "[t]he goal of such actions by Defendants was to prompt withdrawal of TNRCC and DOE support for the authorizations required by WCS to enter the relevant product markets." *Id.* Indeed, WCS alleges that the Defendants' "false or misleading statements were taken seriously by the government officials to whom they were directed." *Id.* at ¶ 70.

WCS also alleges that the Defendants made a "sham" license application to operate a competing low-level radioactive disposal site in Andrews, Texas. *Id.* at ¶ 71. WCS points out that Defendant Envirocare of Texas's application was far inferior to WCS's own application and that it was made merely to give the "false illusion" [6] that Texas was going to become a dumping ground for radioactive wastes. *Id.* at ¶¶ 71-77. Because the sham application was inadequate,

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[6] The Court will assume that Plaintiff does not really allege that the Defendants created a *false* illusion, but merely an illusion or a false impression.

WCS alleges that the TNRCC denied Envirocare's application and then withdrew its support for WCS's oversight plan with the DOE. *Id.* at ¶¶ 77-80. Consequently, the DOE withdrew consideration of WCS for its disposal needs. *Id.* at ¶ 80. WCS states that "TNRCC's withdrawal, coupled with other direct interference by Envirocare at DOE" has caused WCS to lose (1) a $350 million contract for disposal of wastes at the DOE's Fernald, Ohio, Field Office; (2) a $10-100 million contract with the U.S. Army Corps of Engineers; and (3) a lost future share of the relevant markets for DOE wastes with a net present value of $1 billion. *Id.* at ¶¶ 81-86.

WCS also claims that the Defendants' lobbyists improperly delayed WCS's application with the TDH to obtain a permit to store radioactive wastes in Andrews County. *Id.* at ¶ 87. Under TDH's financial assurances requirements, WCS was apparently "forced to specify use of Envirocare's 'essential facility.' " *Id.* at ¶ 88. The Defendants, however, argued that "Envirocare had no obligation to receive wastes from WCS [without a contract]." *Id.* at ¶ 89. Moreover, at a August 1997 public hearing, the Defendants "publicly disparaged the regulatory process leading to the TDH staff recommendation, and improperly petitioned TDH with a series of written 'questions' about the WCS permit and the TDH regulatory process." *Id.* at ¶ 91. WCS also notes that the Defendants' opposition to WCS's plans was inconsistent with the Defendants' own application for Envirocare of Texas. *Id.* Finally, however, WCS did receive its TDH permit on November 3, 1997. *Id.* at ¶ 92.

WCS additionally contends that the Defendants "have improperly or illegally colluded with key Department of Energy officials charged with reviewing proposals put to that agency by WCS so as to deprive WCS of a fair and impartial government review of such proposals." *Id.* at ¶ 94. Furthermore, although outside the relevant markets in the

instant case, WCS alleges that the Defendants have "coerce[d] prospective WCS customers into disposing of their ancillary waste streams at Envirocare's Utah facility . . . [by] threaten[ing] prospective WCS clients with termination of Envirocare's current radioactive waste disposal services or with the refusal of Envirocare to take ancillary waste streams that can only be disposed of at Envirocare's site, if the customer uses WCS for *any* waste storage, treatment, or disposal services." *Id.* at ¶ 96 (Pl.'s emphasis). According to WCS, this customer interference has also prevented WCS from entering DOE's disposal market "by depriving WCS of customers needed to sustain the costs of entering the mixed and low-level radioactive waste disposal markets." *Id.* at ¶¶ 99-100.

Therefore, WCS's claims for (1) monopolization and attempted monopolization under Section 2 of the Sherman Act, 15 U.S.C. §2; (2) tortious interference with prospective business relations; (3) business defamation; and (4) business disparagement are all ultimately based on WCS's failure to enter the DOE's waste disposal market. Consequently, for each claim, WCS alleges damages for $1 billion of lost market share and more than $450 million for lost contracts with the DOE. *Id.* at ¶¶ 109, 114, 118, 122, 129, 134. Furthermore, WCS requests trebled damages for its antitrust claims, punitive or exemplary damages, and injunctive relief against the Defendants. *Id.* at 50-51. WCS claims that each time the DOE offers a contract to dispose of its wastes, "WCS will lose an opportunity (often a multi-year opportunity) to offer DOE its disposal services." *Id.* at ¶ 103. The Court now turns to those specific allegations and the Defendants assertions that the Plaintiff's claims are unavailing.

III. DISCUSSION

Because the Defendants' attempts to influence the policy decisions of two government agencies, the DOE and the TNRCC, are at the core of the Plaintiff's case, the Defendants

contend that the *Noerr-Pennington* doctrine shields their actions from Plaintiff's claims.

A. The Noerr-Pennington Doctrine

Section 2 of the Sherman Act at 15 U.S.C. § 2 provides a cause of action for monopolization and attempted monopolization:

> Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

15 U.S.C. § 2 (1997); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). However, beginning with *Eastern R.R. Presidents Conference v. Noerr Motor Freigh, Inc.* 65 U.S. 127 (1961), the U.S. Supreme Court established "that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136. Then, in *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), the Court re-emphasized that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670. Finally, in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court extended the *Noerr-Pennington* doctrine to "the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and the arms of the executive) and to courts, the third branch of government." *Id.* at 510.

Recognizing that valid government activity will often negatively impact economic competition, the *Noerr-Pennington* doctrine is deeply rooted both in the need to protect the legitimacy of government processes and to protect the First Amendment right to petition the government. For example, the Court has observed that "where a restraint upon trade or monopolization is the result of valid governmental

action, as opposed to private action, no violation of the [Sherman] Act can be made out . . . . [because] under our form of government *the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of governinent so long as the law itself does not violate some provision of the Constitution.*" *Noerr*, 365 U.S. at 136 (emphasis added). To hold otherwise "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137. Moreover, as would also be the case with legislative and executive processes, "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors." *California Motor Transport Co.*, 404 U.S. at 510-11.

B. The "Sham" Exception

Even as the Supreme Court was establishing the *Noerr-Pennington* doctrine, it was also establishing that "there may be instances where the alleged [antitrust] conspiracy 'is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 511 (quoting *Noerr*, 365 U.S. at 144). As developed by the Court, the scope of the "sham" exception will vary according to "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Not until *Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), however, did the Supreme Court end much of the ambiguity[7] surrounding

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[7] *See* James B. Perrine, Commentary, *Defining the "Sham Litigation" Exception to the Noerr-Pennington Antitrust Immunity Doctrine: An*

sham litigation by setting forth a two-part "objective-then-subjective" test to determine whether litigation was a "sham" unworthy of *Noerr-Pennington* immunity:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.

Id. at 60-61 (internal quotation marks and citations omitted). Thus, the plaintiff must "disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." *Id.* at 61.

For plaintiffs, overcoming the objective prong of the *Professional Real Estate Investors* test is a difficult task. The plaintiff must prove that the defendant's "pursuit of claims [was] so baseless that no reasonable litigant could realistically expect to secure favorable relief." *Id.* at 62. Thus, to retain *Noerr-Pennington* immunity, the defendant need merely show that it had "probable cause" to institute legal

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Analysis of the Professional Real Estate Investors v. Columbia Pictures Industries Decision, 46 ALA. L. REV. 815 (1995) (describing ambiguity surrounding *Noerr* doctrine before the *Professional Real Estate* decision which established a threshold "objective" test for determining whether litigation was a sham).

proceedings regardless of the defendant's intent. *Id.* at 63 ("[E]vidence of anti-competitive intent cannot affect the objective prong of *Noerr*'s sham exception.").

1. Successful Actions

A reasonable act, however, is proven where the petitioner of government action is successful. In *Professional Real Estate Investors*, the Supreme Court noted that "we have explicitly observed that a successful 'effort to influence governmental action . . . certainly cannot be characterized as a sham.' " *Id.* at 58 (quoting *Allied Tube & Conduit Corp.*, 486 U.S. at 502). Therefore, "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and . . . not a sham." *Id.* at 60 n.5; *Fox News Network, LLC v. Time Warner Inc.*, 962 F.Supp. 339, 345 (E.D.N.Y. 1997) ("[A] successful effort to influence governmental action cannot be considered a sham.).[8] In the legislative context, the Court in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), observed that a private industry group's attempts to influence state and local governments through publication of a "Code" establishing performance requirements for the design and installation of electrical wiring systems "cannot by characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances." *Id.* at 502.

Indeed, in *USS-Posco Industries v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800 (9th

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[8] The Court warned also that "when the antitrust defendant has lost the underlying litigation, a court must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.' " *Professional Real Estate Investors*, 508 U.S. at 60 n.5 (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)); *see also Hartford Life Ins. Co. v. Variable Annuity Life Ins. Co.*, 964 F.Supp. 624, 628 (D.Conn. 1997) (losing lawsuit does not mean that defendant had no probable cause to instigate reasonable litigation).

Cir. 1994), the Ninth Circuit Court of Appeals held that the defendant union's twenty-nine separate lawsuits against the plaintiffs could not be considered a sham where "fifteen of the twenty-nine lawsuits alleged by [one of the plaintiffs] as part of the pattern of filings 'without regard to the merits' have proven successful." *Id.* at 811. The appellant court reasoned that "[t]he fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success." *Id.; see also In Re Circuit Breaker Litigation*, 984 F.Supp. 1267, 1274 (C.D.Cal. 1997) ("[T]he Court also finds that Plaintiff's success thus far in this litigation indicates that the lawsuits are not 'objectively baseless,' which precludes a finding that *In re Circuit Breaker Litigation* constitutes a 'sham' petitioning.").

The Supreme Court's recognition that successful petitioning efforts are not shams further reinforces the principle that the *Noerr-Pennington* doctrine protects the legitimacy of our government processes. *Noerr*, 365 U.S. at 136. Thus, in successful actions "[w]here a restraint upon trade or monopolization is the result of *valid governmental action*, as opposed to private action,' those urging the governmental action enjoy *absolute immunity* from antitrust liability for the anticompetitive restraint." *Allied Tube & Conduit Corp.*, 486 U.S. at 499 (quoting *Noerr*, 365 U.S. at 136) (emphasis added). However, in unsuccessful actions "where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a *valid effort* to influence governmental action." *Id.* (emphasis added).

In the instant case, all of the Plaintiff's alleged antitrust injuries are squarely the result of the successful petitioning of government action for which the Defendants are generally

entitled to "absolute immunity." *Allied Tube & Conduit Corp.*, 486 U.S. at 499. The Plaintiff's allegations are simply that the Defendants petitioned federal and state officials to not authorize the Plaintiff to enter the DOE's waste disposal market. *See* Background *supra* at 6-7. As the Supreme Court has explicitly noted, successful petitioning activity "is *by definition* a reasonable effort at petitioning for redress and . . . not a sham." *Professional Real Estate Investors*, 508 U.S. at 60 n.5 (emphasis added). On that basis alone, the Plaintiff's antitrust cause of action should be dismissed without inquiry into the federal and state agency decision-making processes.[9] *Noerr*, 365 U.S. at 136 (where restraint on trade caused by valid government action, no violation of Sherman Act possible). However, despite the Supreme Court's explicit observations, this Court is reluctant to summarily dismiss the Plaintiff's cause of action without first examining Plaintiff's allegations challenging the *validity* of the government decisions in this case.

2. Misrepresentations in "Sham" Allegations

The Plaintiff's Second Amended Complaint ("Complaint") further challenges the very *validity* of the government action which the Defendants sought in this case. Essentially, the Plaintiff alleges that the Defendants' petitioning activities invalidated the DOE's and the TNRCC's decisions because the Defendants (1) presented false and misleading claims of technical defects and legal issues to federal and state officials, (2) created environmental groups to push forward bogus technical or environmental concerns, and (3) used a "sham" disposal application with the TNRCC to threaten the opening

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[9] The Court would also forego examining the Plaintiff's other allegations of anti-competitive behavior that fall outside of government petitioning activity because the Plaintiff would not be able to complain of a restraint on trade in a market that it by law had no right in which to compete. *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 418 (5th Cir. 1954).

of competing disposal site in close proximity to WCS to create the illusion that Texas was to become a "dumping ground" for nuclear wastes. *Pl's Second Am. Compl.* at ¶ 62. Thus, the Plaintiff complains that the Defendants prevented it from having *meaningful access* to the government officials regulating the DOE's disposal market. *California Motor Transport*, 404 U.S. at 512.

The Supreme Court, unfortunately, has not clearly articulated the role that allegations of deliberate misrepresentation play in the face of successful efforts to influence government actions. Although such allegations challenge the very legitimacy of "successful" petitioning efforts, the Court in *Professional Real Estate Investors* specifically noted that "[w]e need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Professional Real Estate Investors*, 508 U.S. at 61 n.6. At most, the courts have recognized that the role of misrepresentations in the "sham" analysis will depend upon whether the petitioning effort is made in (1) a more legislative and "political" setting, or (2) an adjudicative setting. For example, "[a] publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs *unethical* and *deceptive* methods." *Allied Tube & Conduit Corp*, 486 U.S. at 499-500 (emphasis added). However, "[m]isrepresentations, condoned in the *political* arena, are not immunized when used in the *adjudicatory* process." *California Motor Transport Co.*, 404 U.S. at 513 (emphasis added). Thus, a court examining allegations of misrepresentations before government officials should consider whether the petitioning activity at issue is more a part of the "political arena" than a part of the "adjudicatory process" before concluding that the petitioners caused a "valid governmental action" or were part of a "valid effort to influence governmental action." *See Gen-Probe, Inc. v.*

Amoco Corp., 926 F.Supp. 948, 956 (S.D.Cal. 1996) (*Noerr* immunizes wider range of conduct in the political arena than before an adjudicatory body); *Fischer Sand and Aggregate Co. v. City of Lakeville*, 874 F.Supp. 957, 960 n.4 (D.Minn. 1994) (finding that rezoning and permit proceedings in front of city officials and state agencies were "more legislative and 'political' than judicial in character."). This consideration is important because the court presiding over allegations of "sham" petitioning must essentially review the antitrust action's underlying adjudicatory processes in order to determine whether the defendants' petitioning activities sought "to bar their competitors from *meaningful access* to *adjudicatory* tribunals and the decision-making process." *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 325 (5th Cir. 1994) (emphasis added).[10]

The line between "political" and adjudicatory processes, however, blurs when considering the actions of government agencies because they are peculiarly "creatures of the legislature, and the arms of the executive." *California Motor Transport*, 404 U.S. at 510. Nevertheless, this Court sees no reason why petitioning efforts in front of agencies or administrative bodies cannot also be clearly more legislative and political than adjudicative in nature. At the heart of the political-versus-adjudicatory-line-drawing appears to be the great deference which courts must give to the policy-oriented and politically-accountable legislature. *See Noerr*, 365 U.S. at 136 (allowing deceptive and unethical campaigns to influence legislature to pass favorable laws and noting "responsibility"

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[10] Of course, the *Noerr-Pennington* doctrine does not protect criminal conduct, such as bribery, in any context. *Federal Prescription Serv., Inc. v. Am. Pharmaceutical Ass'n*, 663 F.2d 253, 263 (D.C.Cir. 1981) ("Attempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of *Noerr*."), *cert. denied*, 455 U.S. 928 (1982).

of legislative and executive branches to determine the passage of laws "so long as" the laws are constitutional). And, just as courts must defer to the discretionary authority of the legislature, courts also defer to agency policy-making decisions that fall within an agency's discretion as directed by the legislature. *See Louisiana Dep't of Labor v. U.S. Dep't of Labor*, 108 F.3d 614, 618 (5th Cir. 1997) (citing *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984)) (Where the intent of Congress is unclear because a statute is ambiguous, courts must defer to merely "reasonable interpretations" made by the agency charged with administering the statute's mandates.), *cert. denied*, 118 S.Ct. 80 (1997). Indeed, as the Fifth Circuit has noted, "where Congress has charged an agency with administering [a] statute, courts must not substitute their judgment for the delegated policymaking role of the agency." *Microcomputer Technology Inst. v. Riley*, 139 F.3d 1044, 1049 (5th Cir. 1998). Furthermore, this delegated policy-making role is clearly more a part of a *political* rather than adjudicatory process because, " '[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of government to make policy choices.'" *Id.* (quoting *Chevron*, 467 U.S. at 865-66).

To determine the effect of Plaintiff's allegations of misrepresentations in the case at bar, the Court must be especially mindful of the regulatory framework that Congress has established for the disposal of low-level radioactive and mixed wastes. Under the Atomic Energy Act of 1954, Pub.L. No. 102-486, 106 Stat. 2944 (codified as amended at 42 U.S.C. §§ 2011-2297g-4 (1994)), the federal government has the power "to regulate all activities involving radiological health and safety of atomic energy and its byproducts." *Waste Control Specialists, LLC v. U.S. Dep't of Energy*, 141 F.3d 564, 565 (5th Cir. 1998); *see* 42 U.S.C. § 2013 (1994).

Moreover, the federal government is "responsible for the disposal of . . . low-level radioactive waste owned or generated by the Department of Energy." 42 U.S.C. § 2021c(b)(1) (1994). Although the Nuclear Regulatory Commission ("NRC") normally issues licenses for sites to dispose of low-level radioactive wastes, the NRC may also exempt certain activities from licensing such as contractor work for the DOE at a federally owned or controlled site. *Waste Control Specialists*, 141 F.3d at 566 (citing 42 U.S.C. § 2111 (1994) and 10 C.F.R. § 30.12(a) (1997)[11]). By agreement, however, the NRC may relinquish regulatory oversight for the disposal of low-level radioactive wastes to "agreement states" which must consider "the protection of the public health and safety from radiation hazards." 42 U.S.C. 2021(b) (1994). Texas is one such "agreement state," but Texas law does not allow for the licensure of *private* entities like the Plaintiff to dispose of the DOE's low-level radioactive and mixed wastes. *Waste Control Specialists*, 141 F.3d at 566 (citing TEX. HEALTH & SAFETY CODE ANN. § 401.203 (West 1992)).[12] However, as the Plaintiff's Complaint correctly points out, the DOE may itself *choose* to exercise "control" over a Texas private entity and therefore allow that entity to enter the DOE's disposal market. *Id.* at 568.

Therefore, the regulatory framework underlying the instant case provides that the DOE's and the TNRCC's decisions

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[11] 10 C.F.R. § 30.12(a) provides that "any prime contractor" disposing of the DOE's low-level radioactive wastes may be exempt from certain licensing requirements if performing work conducted "for the [DOE] at a United States Government-owned or *controlled* site." 10 C.F.R. § 30.12(a) (1998) (emphasis added).

[12] The Texas legislature has provided that "[a] radioactive waste disposal license may be issued only to public entity specifically authorized by law for radioactive waste disposal." TEX. HEALTH & SAFETY CODE ANN.§ 401-203 (West Supp. 1998).

resulting in the Plaintiff's exclusion from the DOE disposal market were simply exercises of their delegated *policy-making* authority influenced by petitioning in the *political* rather than *adjudicatory* arena. Indeed, this conclusion was abundantly made clear by the Fifth Circuit recently in *Waste Control Specialists, LLC v. U.S. Dep't of Energy*, 141 F.3d 564 (5th Cir. 1998). In that case, the very same Plaintiff in the case at bar also argued that it was qualified to enter the DOE's disposal market and in fact challenged "whether the DOE ha[d] the discretion to require a state license as a requirement for bidding" on the DOE's contracts to dispose of low-level radioactive and mixed wastes. *Id.* at 567. The Plaintiff argued that the DOE's decision to reject the Plaintiff's bid was thus "arbitrary and capricious." *Id.*

The Fifth Circuit, however, disagreed with the Plaintiff and directed the district court to dismiss the Plaintiff's case against the DOE. *Id.* at 568. Specifically, the appellate court recognized that the DOE had the discretion to accept or reject the Plaintiff's application to enter the DOE's disposal market on the condition that the Plaintiff meet certain state licensing requirements:

> If DOE chooses to regulate, or 'control', the private waste disposal sites, then the sites are exempt from NRC and state licensing requirements. Where, however, DOE does not exercise such control, the NRC and the agreement states retain their power to regulate commercial sites providing a service to DOE. Nothing in the [10 C.F.R. § 30.12] statute indicates that DOE must exercise regulatory authority over such sites.

Id. Thus, in that case, the Fifth Circuit rejected the Plaintiff's attempt to litigate its way into the DOE disposal market because "WCS [was] effectively asking the courts to intrude into the agency's policy making process without a statutory basis." *Id.*

Furthermore, the Fifth Circuit decision makes clear that the TNRCC's choice to withdraw as a proposed oversight body on behalf of the DOE was also a policy *consideration* appropriate to the political arena, not the adjudicatory one. *Id.* at 566. As the Plaintiff's Complaint properly points out, Texas law does not allow the TNRCC to grant a license to the Plaintiff to dispose of the DOE's low-level radioactive and mixed wastes because the Plaintiff is not a public entity. *Id.*; *see Pl.'s Second Am. Compl.* at ¶¶ 35-36. Moreover, Texas law certainly does not require that the TNRCC act as an oversight body for the DOE should it choose to gain "control" over a private disposal facility in Texas. *See* TEX. HEALTH & SAFETY CODE ANN. § 401.203 (West 1992). Thus. the TNRCC's election to either agree or not agree with the Plaintiffs oversight proposal with the DOE was always a delegated *policy* choice properly in the political arena, not an adjudicatory one.

Accordingly, the Court finds that the Plaintiff's allegations of deliberate misrepresentations of the Defendants to federal and state officials do not detract from the "validity" of the DOE's and the TNRCC's decisions in this case or the conclusion that the Defendants' successful petitioning efforts were not objectively baseless.[13] The "source, context, and nature" of the petitioning activity and the government's

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[13] The Court will only consider the Plaintiff's specific allegations of misrepresentation, not merely conclusory ones. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1062 (5th Cir. 1994); *Music Ctr. S.N.C. Di Luciano Pisoni & C. v. Prestini Musica Instruments Corp.*, 874 F.Supp. 543, 549 (E.D.N.Y. 1995) ("To allow antitrust claims based solely on broad and indistinct allegations of misrepresentation and 'sham litigation' to reach discovery, regardless of the role the claimed misrepresentations played, or could have played, in the prior proceeding, would predicate the viability of an antitrust complaint on a petitioner's subjective intent, and not the objective merit of its petition . . . . Moreover, such discovery would have the effect of encouraging antitrust 'strike suits', and effectively chill the First Amendment rights which *Noerr* immunity was intended to protect.").

action restraining trade in the present case all suggest that the alleged misrepresentations attributed to the Defendants were tolerable consequences of debate in the political arena, not punishable misrepresentations in the adjudicatory process. *See Allied Tube & Conduit Corp.*, 486 U.S. at 499; *California Motor Transport Co.*, 404 U.S. at 513. Ultimately, the federal and state officials in the instant case had the delegated responsibility to make policy decisions based upon a balancing of concerns that included competition, safety, and state involvement. *Waste Control Specialists. LLC*, 141 F.3d at 568. To allow an action to go forward challenging the validity of such policy decisions, and in fact without even involving the policymakers themselves as parties in the action, would eviscerate the policy-making role of our government agencies and the deference courts must give to their policy decisions.[14] The Plaintiff would be "effectively asking the courts to intrude into the agency's policy making process without a statutory basis." *Id.* In short, the Court cannot apply the Sherman Act to grant the Plaintiff entrance through the DOE's backdoor knowing full-well that the Plaintiff will not be invited to eat at the table.

Moreover, given the agency decisions in this case, the Plaintiff's allegations are also quite impractical judicially and beyond the scope of the antitrust laws. Notably, under the *Noerr-Pennington* doctrine, the Plaintiff's claim that the Defendants "colluded with key Department of Energy officials charged with reviewing proposals put to that agency by WCS so as to deprive WCS of a fair and impartial government review" is not actionable. *Pl.'s Second Am.*

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[14] Although courts are certainly in the business of *adjudicating* issues and may readily determine whether an effort at litigation was done with "probable cause" or was "baseless", courts are not in the business of determining policy issues delegated to agency discretion. Thus, courts should not attempt to determine the reasonability of *successful* petitioning efforts in the policy-making process because courts simply do not have the agency's expertise to make such determinations.

Compl. at ¶ 94. In *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), the Supreme Court held that, between public officials who implement restraints on trade and private individuals who petition for such restraints, "a 'conspiracy' exception to *Noerr* must be rejected . . . . [because] the antitrust laws regulate *business*, not *politics*." *Id.* at 383 (emphasis added). Indeed, as in *City of Columbia*, the Plaintiff in the present case is effectively asking a fact-finder to invalidate the decisions of the DOE and the TNRCC by examining whether the Defendants were successful in completely *duping* or *conspiring* with agency officials to reject the Plaintiff's proposals to enter the DOE's waste disposal market. *Id.* Such a task, the Supreme Court noted, could not be done because it was "impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests . . . . [just as it was] impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials." *Id.* Indeed, the Plaintiff has not alleged that the Defendants bribed or otherwise engaged in criminal activity with DOE and TNRCC officials. Thus, if the DOE or the TNRCC has in fact abused its own discretionary policy-making authority, that is a question best determined by a direct action against those agencies alleging that their actions violated due process or were otherwise arbitrary and capricious, not by application of the Sherman Act against a successful co-participant attempting to influence the policy-making process.

C. Meaningful Access to Regulatory Processes

Alternatively, although Plaintiff's allegations are essentially that the Defendants' campaign against the Plaintiff was a "sham" which denied it *meaningful access* to the government officials responsible for authorizing access to the DOE's disposal market, the Plaintiff's factual allegations reveal quite

the opposite. *Pl.'s Second Am. Compl.* at ¶¶ 35-42. For example, because of the Plaintiff's discussions with the DOE, the Plaintiff contends that "DOE *senior policy officials* expressed interest in the WCS proposal and reaffirmed their desire to create competition for Envirocare in the private disposal market for DOE's low-level radioactive and mixed wastes." *Id.* at ¶ 38 (emphasis added). Moreover, after the Plaintiff's discussions with the TNRCC, the TNRCC also "expressed interest in the [WCS oversight] proposal, and sent TNRCC *policy makers, technical specialists, and attorneys* to visit the Andrews County Facility." *Id.* at ¶ 39 (emphasis added). Finally, the Plaintiff's lobbying efforts were apparently so persuasive that the Plaintiff formed a "Memorandum of Agreement" to implement its oversight plan with both the DOE and the TNRCC. *Id.* at ¶ 40. Thus, taken as true, the Plaintiff's allegations reveal that the Defendants' "conspiracy" did not really deny the Plaintiff *meaningful access* to state and federal regulatory officials. *Brown & Root, Inc.*, 10 F.3d at 325; *Cf. Whelan v. Abell*, 48 F.3d 1247, 1256 (D.C.Cir. 1995) (assuming that regulatory authorities conducted an independent investigation and found probable cause, the appellate court noted that plaintiffs had no opportunity to contest the findings). Not only did the Plaintiff have meaningful access to agency officials in the political arena, it admittedly had their special attention as well.

The Court also does not agree that the Defendants' "sham" application for a competing waste disposal site in Texas is sufficient to save the Plaintiff's claims. Although the Plaintiff claims that the Defendants' application for its Envirocare of Texas site was a "sham" instituted to create the appearance that Texas was going to become a "dumping ground" for nuclear waste disposal, the Plaintiff's allegations of intent are irrelevant to determining whether the Defendants' actions were objectively baseless. *Professional Real Estate Investors*, 508 U.S. at 63; *Fischer Sand and Aggregate Co.*, 874 F.Supp.

at 960. Furthermore, the Court is at pains to see how the Defendants' competitive application to enter the same business which the Plaintiff proposed in Texas was at all a denial of meaningful access to the state regulatory officials deciding the Plaintiff's separate DOE oversight proposal. The Plaintiff's Complaint certainly establishes that the Plaintiff's applications with the TNRCC were far superior to the Defendants' application. *Pl.'s Second Am. Compl.* at ¶¶ 71-76. However, the Defendants' application did not "directly" interfere with the Plaintiff's own negotiations with the DOE or the TNRCC. *See City of Columbia*, 499 U.S. at 381 (stating that classic example of sham petitioning was filing frivolous *objections* to license application of competitor to *directly* impose expense and delay on competitor). And finally, as this Court has already concluded, the TNRCC's final decision to reject the Plaintiff's oversight proposal with the DOE was entirely within its policy-making discretion and the agency was free to consider information from many sources. Therefore, because the Defendants' successful petitioning efforts are protected under the *Noerr-Pennington* doctrine, the Court will dismiss the Plaintiff's federal antitrust causes of action based upon the Defendants' alleged misrepresentations to agency officials.

D. Denial of "Essential Facility"

Quite simply, "[t]o be an essential facility, . . . a facility must be essential." *Blue Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). Although a "monopolist has no general duty to share his essential facility," *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 1998 WL 396239, at *7 (D.C.Cir. 1998), a plaintiff may establish the improper denial of an essential facility by proving that "(1) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiff use of the

facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility." *Id.*

In this case, Plaintiff's allegation that the Defendants threatened to deprive competitors or customers the use of Envirocare's "essential facility" in Utah for their disposal needs or financial assurances requirements does not fall under the *Noerr-Pennington* doctrine because it was not a part of a legitimate petitioning activity. *Pl.'s Second Am. Compl.* at ¶ 62; *Laitram Machinery, Inc. v. Carnitech*, 901 F.Supp. 1155, 1161 (E.D.La. 1995) (*Noerr-Pennington* did not apply to sending letters to competitor's customers alleging violation of trade secrets and patent infringement.). However, the Plaintiff's allegations fall short of establishing a denial of an essential facility. First, assuming the Defendants would not allow the Plaintiff to designate the Defendants' Utah disposal facility as an alternative disposal site in case of the Plaintiff's insolvency, the Plaintiff cannot say that the Defendants' facility was *essential* to obtaining a TDH license where the Plaintiff finally did obtain a TDH license without the Defendants' permission to use the Utah disposal site. *Pl.'s Second Am. Compl.* at ¶ 92. Second, the Plaintiffs allegations cannot connect any delays in TDH licensing with its claimed damages caused by the DOE's and the TNRCC's decisions to reject the Plaintiff's oversight proposals. *See Creek v. Village of Westhaven*, 80 F.3d 186, 189 (7th Cir. 1996) ("The [petitioning] delays did not make it more likely that federal law would change adversely to Creek. Therefore, those changes cannot be deemed 'caused' by the defendant, because, to count as a cause, an act must both be a necessary condition (but-for cause) of the result and make the result antecedently more likely to occur."), *cert. denied*, 117 S.Ct. 180 (1996).

The Plaintiff, however, also contends that the Defendants threatened the Plaintiff's private customers by suggesting that the Utah radioactive waste disposal facility would not be

available to the Plaintiff's customers if those customers did business with the Plaintiff. *Pl.'s Second Am. Compl.* at ¶¶ 95-100. The Plaintiff's claims for damages, however, only relate to the Plaintiff's failure to enter the *DOE's disposal market*, not to injuries in other markets. Thus, the Plaintiff cannot argue for an antitrust injury in this case where valid government decisions have denied the Plaintiff the "legal right" to compete in the relevant market. *Okefenokee Rural Electric Membership Corp.*, 214 F.2d at 418.[15] Therefore, the Court will dismiss the Plaintiff's antitrust claims based on the Defendants' alleged denial of their essential facility to the Plaintiff and the Plaintiff's prospective customers.

E. Other Claims

Finally, the Court must address the Plaintiff's state causes of action for (1) tortious interference with prospective business relations, (2) business defamation, and (3) business disparagement. Under Texas law, "[t]o prove tortious interference with prospective contracts or business relationships, the plaintiff must prove that the defendant willfully and intentionally acted to prevent a contractual relationship that the plaintiff had a reasonable probability of realizing, thus proximately causing the plaintiff actual damages." *Caller-Times Pub. Co. v. Triad Communications, Inc.*, 855 S.W.2d 18, 21 (Tex.Ct.App. 1993). Moreover, "[w]hen a party alleges tortious interference with prospective business relations which are the subject of competition, the party must show he suffered 1) actual damages 2) caused by 3) defendant's intentional acts 4) which interfered with 5) a reasonably probable business relationship and 6) which violated antitrust laws or caused third persons to refuse to

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[15] Even if the Defendants improperly denied their "essential facility" to the Plaintiff and its customers, the "[a]llegations that some petitioning activities are a sham do not defeat *Noerr-Pennington* protection for other petitioning activities." *Classic Communications, Inc. v. Rural Telephone Service Co., Inc.*, 956 F.Supp. 910, 918 (D.Kan. 1997).

deal with the party." *Id.* The instant case, of course, relates to the prospective business relationship between the Plaintiff and the DOE. Plaintiff's claims for damages relate directly to the Defendants' interference with this prospective relationship and *not* to any other parties. However, the Court finds that the Defendants' petitioning activities did not violate the antitrust laws and therefore the Plaintiff's claim for tortious interference with prospective business relations must be dismissed.

Regarding the Plaintiff's defamation and business disparagement causes of action, Texas law recognizes that the two causes of action "[b]oth involve the imposition of liability for injury sustained through publications to third parties of a false statement affecting the plaintiff." *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). However, the torts protect different interests because the "action for defamation is to protect the personal reputation of the injured party, whereas the action for injurious falsehood or business disparagement is to protect the economic interests of the injured party against pecuniary loss." *Id.* Consequently, "[a] defamation plaintiff must prove that the allegedly defamatory language is false and that the defendant's publication of the language proximately caused the plaintiff's damages." *Brown v. Petrolite Corp.*, 965 F.2d 38, 43 (5th Cir. 1992). Yet, in a business disparagement claim, the plaintiff must prove "publication by the defendant of the disparaging words, falsity, malice, lack of privilege, and *special damages*." *Hurlbut*, 749 S.W.2d at 766 (emphasis added). Furthermore, the disparaging words "must play a substantial part in inducing others not to deal with the plaintiff' and the resulting special damages would "require[] that the plaintiff 'establish pecuniary loss that has been realized or liquidated as in the case of specific lost sales." *Id.* (quoting W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 128 at 971 (5th Ed. 1984)).

Under the Plaintiff's alleged facts, however, all of the Defendants' false, defamatory, and disparaging statements were in the written and oral petitioning efforts made "with key Texas and federal government officials and media concerning matters of significance and importance to Plaintiff's business." *Pl.'s Second Am. Compl.* at ¶¶ 131, 136. Moreover, the Plaintiff's alleged damages caused by the Defendants' statements arose directly from the DOE's and the TNRCC's decisions rejecting the Plaintiff's DOE oversight proposal. Thus, the Plaintiff's Complaint basically seeks the same damages that it sought in its antitrust claims and is based upon the same misrepresentations. *Id.* at ¶¶ 134, 138. But, as the Court has found, the Defendants' alleged misrepresentations could not invalidate the government action which prevented the Plaintiff from entering the DOE disposal market in this case.

Therefore, two principles require the Court to dismiss the Plaintiff's claims for business disparagement and defamation. First, because the *Noerr-Pennington* doctrine rests on First Amendment petitioning rights, *California Motor Transport Co.*, 404 U.S. at 510-11, then "any behavior by a private party that is protected from antitrust liability by the *Noerr-Pennington* doctrine" should also be outside the scope of other actions based on the same behavior. *Video Intern. Prod. v. Warner-Amex Cable Com.*, 858 F.2d 1075, 1084-85 (5th Cir. 1988) (holding that behavior protected under *Noerr-Pennington* could not constitute a § 1983 claim or a Texas tortious interference with contract claim), *cert. denied*, 490 U.S. 1047 (1989); *Fox News Network*, 962 F.Supp. at 345 ("The doctrine originated as a limit on antitrust liability, but has been used to prohibit other types of proceedings, including civil rights actions and tortuous interference claims."); *Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc.*, 916 F.Supp. 692, 701 (S.D.Oh. 1995) (*Noerr-Pennington* used for immunity to tortuous interference with business claim). Second, because a plaintiff alleging business

disparagement and defamation must link the alleged false statements to actual damages, the Plaintiff's Complaint fails to state a cause of action. The valid government actions in this case simply prevent the Plaintiff from asserting that the Defendants' various misrepresentations were a proximate cause of the Plaintiff's injuries. *Okefenokee Rural Electric Membership Corp.*, 214 F.2d at 418.

IV. CONCLUSION

The Court finds that the Defendants' successful attempts to influence the policy decisions of federal and state agencies were protected petitioning activities under the *Noerr-Pennington* doctrine. Furthermore, the *Noerr-Pennington* doctrine and the valid government actions in the present case shield the Defendants from the Plaintiff's state-law causes of actions. Therefore, the Court shall grant the Defendants' Motion to Dismiss as to all of the Plaintiff's claims in this case.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss is hereby GRANTED.

IT IS FURTHER ORDERED that the above-captioned cause of action is hereby DISMISSED WITH PREJUDICE. Costs are assessed against the Plaintiff.

IT IS FINALLY ORDERED that all pending Motions are hereby DENIED AS MOOT.

SIGNED this 31 day of August, 1998.

/s/ Lucius D. Bunton,
Honorable Lucius D. Bunton, III
Senior District Judge

APPENDIX C

[Filed May 26, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-98-CA-62

WASTE CONTROL SPECIALISTS, LLC,
Plaintiff,

v.

ENVIROCARE OF TEXAS, INC., ENVIROCARE OF UTAH, INC., KHOSROW B. SEMNANI, CHARLES A. JUDD, FRANK C. THORLEY; BILLY W. CLAYTON, AND NANCY M. MOLLEDA,
Defendants.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff's Motion to Remand, filed April 21, 1998. After considering Plaintiff's Motion; and the Defendant's Response to Plaintiff's Motion to Remand, filed May 1, 1998, the Court is of the opinion that the following Order is appropriate.

I. BACKGROUND

On April 13, 1998, Defendants Envirocare of Texas, Inc.; Envirocare of Utah, Inc.; Khosrow B. Semnani; Charles A. Judd; Frank C. Thorley; Billy W. Clayton; and Nancy M. Molleda removed the instant case to the United States District Court for the Western District of Texas on the theory that the Plaintiff Waste Control Specialists, LLC, ("WCS") had alleged a strictly federal cause of action against the Defendants in its state court petition.[1] Specifically, the Defendants con-

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[1] The parties concede that there is no diversity jurisdiction in this case and that the Plaintiff has not explicitly plead a federal cause of action.

tend that the Plaintiff cannot maintain an action under the Texas Free Enterprise and Antitrust Act of 1983 because the Plaintiff's First Amended Petition, filed in state court on March 13, 1998, alleged unlawful interference with strictly interstate commerce. Thus, because the Plaintiff can allege violations of only federal antitrust laws under the Sherman Act, 15 U.S.C. §1 *et seq.*, the Defendants contend that removal is proper under federal subject-matter jurisdiction. 28 U.S.C. §§ 1441(a) and 1331 (1997). On April 21, 1998, the Plaintiff filed a Motion to Remand arguing that its state petition adequately sets forth a viable state antitrust claim, and that the instant case should be remanded to state court. The Court will now examine Defendants' claim that the Plaintiff has tried to merely pull the wool over the Court's eyes by disguising a federal antitrust claim, through artful pleading, as a state antitrust claim.

II. STANDARD OF REVIEW

The federal district courts have federal question removal jurisdiction for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §§ 1441 & 1331 (1997). Even in the absence of diversity jurisdiction, Congress has provided that the federal courts may also have jurisdiction over cases mixed with both federal and state claims. 28 U.S.C. § 1441(c) (1997). The Court's "determination that a cause of action presents a federal question depends upon the allegations of the plaintiff's well-pleaded complaint." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). The Court will examine "if there appears on the face of the complaint some substantial, disputed question of federal law." *Id.* Moreover, the burden of proving subject matter jurisdiction rests with the party attempting to remove a case to federal court. *Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254, 1257-59 (5th Cir. 1988); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988), *aff'd*, 503 U.S. 131 (1992).

As a general rule, the plaintiff is "the master of his complaint." *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995). Consequently, a case " 'cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant.' " *Id.* (quoting *Great Northern Ry., Co. v. Alexander*, 246 U.S. 276, 281 (1918)). Indeed, "it is plain that when both federal and state remedies are available, plaintiff's election to proceed exclusively under state law does not give rise to federal jurisdiction." *Id.* "A plaintiff with a choice between federal- and state-law claims may elect to proceed in state court on the exclusive basis of state law, thus defeating the defendant's opportunity to remove, but taking the risk that his federal claims will one day be precluded." *Carpenter*, 44 F.3d at 366.[2]

The Fifth Circuit Court of Appeals, however, also recognizes that a plaintiff cannot "avoid federal jurisdiction by simply 'artfully pleading' a federal cause of action in state law terms." *Avitts*, 53 F.3d at 693.[3] The circuit court notes that the "artful pleading doctrine" is "a narrow exception to the rule requiring the basis of federal question jurisdiction to be found on the face of the plaintiff's well-pleaded complaint

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[2] Of course, a plaintiff does not have a choice between federal and state laws where federal law preempts the state law. *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 115-16 (5th Cir. 1997).

[3] Arguing that the "scope of the artful pleading exception outside of complete preemption remains unclear," *Corporate Travel Consultants v. United Airlines*, 799 F.Supp. 58, 60 n.1 (N.D. Ill. 1992), not all courts agree that the "artful pleading" doctrine may establish federal question jurisdiction. *Four Way Plant Farm, Inc. v. NCCI*, 894 F.Supp. 1538, 1544 (M.D. Ala. 1995) ("This is simply a case of plaintiffs choosing to limit their theory of recovery to a claim under state law. They have a right to do so. If their only possible claim is actually federal, that does not mean that they will recover in state court on a federal claim; it means that they will lose their lawsuit. The court finds that federal question jurisdiction is not established under the theory of artful pleading.").

and not in any anticipated defense." *Carpenter*, 44 F.3d at 367. Thus, "in certain situations where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.* at 366. Finally, "[t]he artful pleading doctrine recognizes that the characterization of a federal claim as a state claim will not in all cases prohibit removal *when the plaintiff has no state claim at all.*" *Id.* at 367 ("The doctrine does not convert legitimate state claims into federal ones, but rather reveals the suit's necessary federal character."). Therefore, "if a plaintiff indeed has a viable state law claim, he may depend on it alone and thereby defeat attempts at removal." *Id.* (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 & n.7 (1987)). Accordingly, the focus of this Court's inquiry is on whether the Plaintiff's state court petition adequately asserts a Texas antitrust cause of action, or whether the Plaintiff's petition is essentially "federal" in character and cannot provide the Plaintiff with a viable state law claim.[4]

III. DISCUSSION

A. Plaintiff's Pleadings

The Plaintiff filed suit in state court against the Defendants on May 2, 1997, alleging that the Defendants intentionally interfered with the Plaintiff's attempts to obtain lucrative government contracts for the disposal of the Department of

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[4] The essential issue in this case is similar to the issue in fraudulent-joinder cases: whether the plaintiff can maintain a state cause of action against the defendant. *Cavallini v. State Farm Mutual Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995) (In a fraudulent joinder case, "[t]he removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts.").

Energy's ("DOE") low-level radioactive and mixed wastes.[5] The Plaintiff's petition sets forth causes of action for (1) violations of the Texas Free Enterprise and Antitrust Act of 1983, (2) libel and slander, (3) business disparagement and (4) tortious interference with prospective business relations.

Plaintiff's Original Petition in state court plead the following in regards to Plaintiff's state antitrust case:

> 87. Envirocare possesses a monopoly in the private-sector market for *disposal of low-level radioactive wastes*, and maintains monopoly power in such market.
>
> 88. Envirocare possesses a monopoly in the private-sector market for *disposal of mixed wastes*, and maintains monopoly power in such market.
>
> 89. The Defendants, and each of them, as complained of herein, acted to preclude or impede Plaintiff's efforts to secure government authorizations for storage, treatment, and/or disposal of low-level radioactive wastes and/or mixed wastes with the intent to maintain Envirocare's monopolies in the *low-level radioactive and mixed waste disposal markets* in violation of Section 15.05(b) of the Texas Business and Commerce Code.

Pl.'s. Orig. Pet. at ¶¶ 87-89 (emphasis added). In contrast, Plaintiff's First Amended Petition in state court plead the following in regards to Plaintiff's state antitrust case:

> 27. For purposes of this dispute, there are two relevant product markets: (1) the private disposal market for *DOE's mixed waste* that must be disposed of off-site; and (2) the private disposal market for *DOE's low-level radioactive wastes* that must be disposed of off-site. The relevant geographic market, for each of these products, is the entire continental United States.

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[5] "Mixed wastes" are "DOE low-level radioactive waste that also contain[ ] 'hazardous' components (as defined by the federal Resource Conservation and Recovery Act) or 'toxic' components (as defined by the federal Toxic Substances Control Act)." *Pl's First Am. Pet.* at ¶ 14.

> 91. In violation of § 15.05(b) of the Texas Business & Commerce Code ("Texas Free Enterprise Act"), Defendants Envirocare, Envirocare of Texas, and Semnani have willfully possessed and illegally maintained a monopoly in the off-site private disposal market for *DOE's mixed wastes.*
>
> 96. In violation of § 15.05(b) of the Tex. Bus. & Comm. Code, the Defendants Envirocare, Envirocare of Texas, and Semnani have willfully possessed and illegally maintained a monopoly in the off-site private disposal market for *DOE's low-level radioactive wastes.*

Pl.'s First Am. Pet. at ¶¶ 27, 91, and 96 (emphasis added).

The Plaintiff's First Amended Petition also reiterates the various anti-competitive acts that form the basis of its antitrust case. For example, the Plaintiff alleges the following:

> (1) Defendant Khosrow Semnani, who owns the Envirocare companies, obtained and continues to maintain the Defendants' monopoly in the private disposal market for the DOE's mixed and low-level radioactive wastes through illegal means;
>
> (2) the Defendants spread false and misleading information about the Plaintiff to the Texas and U.S. agencies which were considering whether to approve the Plaintiff for the disposal of mixed and low-level radioactive wastes;
>
> (3) the Defendants established "sham" operations in Texas to interfere with the Plaintiff's own applications for government disposal authorizations; and
>
> (4) The Defendants unfairly withheld the availability of Envirocare of Utah's disposal site as an alternative disposal site to the Plaintiff's Texas site in case of the Plaintiff's insolvency.

Pl.'s First Am. Pet. at ¶¶ 34, 37, 59-74, 106 (summarized). The Court now examines whether Plaintiff's pleadings establish a viable state antitrust claim.

B. The Texas Free Enterprise and Antitrust Act of 1983: Interstate or Intrastate? —that is the question!

The Texas Free Enterprise and Antitrust Act of 1983 (the "Act") provides the following purpose and construction:

> **§ 15.04.** *Purpose* and Construction
>
> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring *wholly or partly within the State of Texas* and to provide the benefits of that competition to *consumers in the state*. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

TEX. BUS. & COM. CODE § 15.04 (1987) (emphasis added). In addition to prohibiting other anti-competitive practices, the Act makes it "unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce." TEX. BUS. & COM. CODE §15.05(b) (1987). In the instant case, the Plaintiff has brought forth a claim of attempted monopolization in violation of §15.05(b). *Pl.'s First Am. Pet.* at ¶¶ 101 & 105.

In accordance with interpretations of federal antitrust statutes, a plaintiff alleging an attempted monopolization must prove "(1) that the defendant has engaged in predatory or anti-competitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *See also Caller-Times Publishing Co. v. Triad Communications. Inc.*, 826 S.W.2d 576, 580-81 (Tex. 1992) (Texas Supreme Court looks to federal law for monopolization analysis under state antitrust law). Moreover, "[i]n order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the

relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports, Inc.*, 506 U.S. at 456 (emphasis added). Like federal law, Texas's antitrust statutes are "designed to protect competition rather than individual competitors." *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex.Ct.App. 1994). Such laws "protect the public from the failure of the market . . . . [because of] conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc.*, 506 U.S. at 458.

Federal antitrust law does not pre-empt Texas's antitrust law. *Pounds Photographic Labs, Inc. v. Noritsu America Corp. et al*, 818 F.2d 1219, 1226 (5th Cir. 1987); *State v. Southeast Texas Chapter of National Electrical Contractors Ass'n.*, 358 S.W.2d 711, 714 (Tex. Civ. App. 1962), *cert. denied*, 372 U.S. 965 (1963). Indeed, a "state is not generally prohibited from giving effect to its antitrust laws because the regulation affects interstate commerce." *Pounds Photographic Labs*, 818 F.2d at 1226 (citing *Standard Oil Co. v. Tennessee*, 217 U.S. 413, 422 (1910)) (federal pre-emption is not invoked merely because a state law imposes a burden on interstate commerce). However, the Texas antitrust statutes do not apply to actions that are wholly interstate in nature. *Id.* at 1224. The Texas Supreme Court has long recognized that "[a] state has no power to regulate interstate commerce, and is prohibited from so doing by the federal Constitution." *Segal v. McCall Co.*, 184 S.W. 188, 189 (Tex. 1916). The cause of action must implicate intrastate commerce in order for the plaintiff to invoke the protection of the Texas antitrust statutes. *Id.; Cherokee Lab., Inc. v. Rotary Drilling Serv., Inc.*, 383 F.2d 97, 107 (5th Cir. 1967).

Aware of the importance of distinguishing between *interstate and intrastate* commerce, Texas and federal courts "have divided [business] transactions into subparts dealing, respectively, with *interstate* commerce and with *intrastate* commerce and have held that even where the overall transac-

tion primarily affected interstate commerce, the Texas antitrust statutes apply if a component of the transaction implicates intrastate commerce." *Pounds Photographic Labs*, 818 F.2d at 1224 (emphasis added). For example, in *Segal v. McCall Co.*, 184 S.W. 188 (Tex. 1916), the Texas Supreme Court held that the Texas antitrust laws applied to a contract for goods sold from New York to Texas that had both interstate *and* intrastate components. *Id.* at 190. The court found that "[f]or a citizen of New York to sell and transport to a citizen of Texas goods and merchandise is to engage in interstate commerce . . . [and] when the sale and transportation has been completed, and the property has been delivered in Texas to a citizen of Texas, the interstate transaction has ended." *Id.* Therefore, the Court categorized as *intrastate* and within the scope and purpose of the Texas antitrust laws those provisions of the Segal contract which "fix[ed] the price at which the [Texas] vendee shall sell [its goods] at retail in Texas, and provid[ed] that he shall refrain from selling at retail in Texas any other [goods] other than [the vendor's]." *Id.*

Moreover, in *Pounds Photographic Labs, Inc. v. Noritsu America Corp. et al*, 818 F.2d 1219 (5th Cir. 1987), the Fifth Circuit Court of Appeals held that the Texas antitrust laws applied to a cause of action where the defendants attempted "to prevent [the plaintiff] from establishing a [photo] minilab specifically in Austin, thereby restricting trade or lessening competition in the Austin photo lab business." *Id.* at 1224. The appellate court reasoned that "the conduct of the [defendants] had a discrete intrastate impact."*Id.* And, in *Cherokee Lab., Inc. v. Rotary Drilling Serv., Inc.*, 383 F.2d 97 (5th Cir. 1967), cert. denied, 390 U.S. 904 (1968), the Fifth Circuit held that federal antitrust laws, rather than Texas antitrust laws, should be applied to a case where the plaintiff alleged antitrust violations regarding the sale of a product whose market was the "oil field drilling industry in the United States." *Id.* at 100. In *Cherokee*, the plaintiff alleged that the non-Texas defendants entered into an agreement which acted

to make one of them the exclusive distributor of Lytron," a unique substance used in the oil field drilling industry. *Id.* Thus, the plaintiff alleged that the agreement violated the antitrust laws because it forced the plaintiff out of the market as a distributor of Lytron. *Id.* However, noting that the parties' alleged anti-competitive agreements were all performed in *interstate* commerce outside of Texas, the appellate court reasoned that "[t]here was no evidence that [the defendants] imposed any restriction on *intrastate* commerce." *Id.* at 107. Indeed, the plaintiff had acknowledged that "[g]eographically, the market for the product [Lytron] is the United States." *Id.*

In the instant case, the Court finds that the Plaintiff has not adequately alleged a Texas antitrust action because of the wholly interstate, or *non-intrastate*, nature of the DOE private waste-disposal market described in Plaintiff's pleadings. Specifically, the Plaintiff's pleadings essentially establish that the Plaintiff is in competition with the Defendants to provide a service to the DOE alone, not to sell a "product" or market a service to the public or certain segments of the public. For example, the Plaintiff alleges that the Defendants violated the Texas antitrust laws by attempting to monopolize "the disposal market for *DOE's* mixed [and low-level radioactive] wastes." *Pl's First Am. Pet.* at ¶¶ 101 & 105 (emphasis added). Moreover, the Plaintiff clearly states that the relevant market for purposes of its antitrust suit is a national one. *Id.* at ¶ 27. Like the plaintiff in *Cherokee*, the Plaintiff in the instant case clearly acknowledges in its first amended state petition that "[t]he relevant geographic market, for [disposal of DOE's mixed and low-level radioactive wastes], is the entire continental United States."*Id.*

Nevertheless, the Plaintiff contends that the present case is similar to the situation in *Pounds Photographic Labs* because the Defendants attempted to prevent the Plaintiff from establishing a business within the state of Texas. *Pl.'s Mot. Remand* at 6. The Court, however, disagrees. In *Pounds Photo-*

graphic Labs, Inc. v. Noritsu America Corp., 818 F.2d 1219 (5th Cir. 1987), the defendant's actions prevented the plaintiff from establishing a photo-processing lab in Austin, Texas. *Id.* at 1224. True to the purpose of the Texas antitrust laws, the action properly served to protect the interests of Texas consumers who would "benefit" from an increased choice of photo-processing labs for their film. *See* TEX. BUS. & COM. CODE § 15.04 (1987); *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex.Ct.App. 1994) (antitrust laws protect competition, not individual competitors). In the instant case, however, the Plaintiff does not purport to market goods or services to Texas consumers.[6] The Plaintiff simply competes with the Defendants for contracts with the DOE to dispose of the DOE's wastes. Yes, the Plaintiff and the Defendants have competing businesses within Texas, but the Texas consumer does not participate in the market described in the Plaintiff's allegations.[7] Therefore, the Court finds that the Plaintiff's antitrust allegations implicate wholly *interstate* commerce and

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[6] At most, the Plaintiff can claim that the Defendants' alleged anti-competitive actions indirectly affect Texas consumers who pay federal and state taxes or could have been employed in Plaintiff's disposal facility. However, such a broad view of the Texas antitrust laws would eliminate the need for *any* intrastate component in a state antitrust case. Arguably, under such a broad view, a wholly interstate transaction for *merely* the sale of goods from a New York firm to a Texas firm would also have an impact upon the Texas "consumers" who work at the Texas firm and benefit from the sales contract. However, as explained in this Order, courts do not interpret such a transaction to be *intrastate* and within the state antitrust laws. *See, e.g., Segal v. McCall Co.*, 184 S.W. 188 (Tex. 1916) (mere contract to sell goods from New York to Texas does not have intrastate component unless restrictions are placed on the sale of those goods to consumers within Texas).

[7] The Plaintiff also asserts that some of DOE's waste would come from the DOE's facility in Amarillo, Texas, and that some of the Defendants' anti-competitive acts occurred in Texas. *Pl.'s Mot. Remand* at 5-6. However, Plaintiff's contentions fail to include a role for the Texas consumer for whom the Texas antitrust laws are designed. TEX. BUS. & COM. CODE § 15.04 (1987).

that the Texas Antitrust Act does not apply to the Plaintiff's claims of anti-competitive behavior. Consequently, the Court retains federal subject-matter jurisdiction over the Plaintiff's antitrust Complaint.[8]

C. UNTIMELY REMOVAL?

For parties seeking to remove cases to federal court based upon federal question jurisdiction, Congress has provided that "[i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading . . . from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b) (1994); *Burks v. Amerada Hess Corp.*, 8 F.3d 301 (5th Cir. 1993). The Fifth Circuit has noted its rejection of the argument "that the thirty-day removal clock should begin to run when a plaintiff files a pleading that is indeterminate as to removability if the defendant would know in the exercise of due diligence that the case is removable." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994). Thus, the appellate court held that "the removal clock be[gins] to run. . . . only when the defendant[] receive[s] a pleading that reveal[s] on its face that [the plaintiff] was asserting a cause of action based on federal law." *Id.*

In the instant case, the Plaintiff filed its First Amended Petition in the 109th Judicial District in Andrews County, Texas, on March 13, 1998. The Defendants then filed their Notice of Removal to federal court on April 13, 1998. Plaintiff's first Amended Petition clearly states that the relevant market in the Plaintiff's state antitrust claim is the "off-site

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[8] The Court does not address the merits of the Plaintiff's federal antitrust claim, but only whether the Plaintiff has alleged a viable state antitrust claim. The state claim is not viable if intrastate commerce is not implicated.

private disposal market for *DOE'S mixed wastes. . . .*[and] for *DOE''s low-level radioactive wastes." Pl's. First Pet.* at ¶¶ 91 and 96 (emphasis added). However, the Plaintiff's Original Petition merely categorized the relevant market in the Plaintiff's state antitrust claim as "the private-sector market for *disposal of mixed wastes* and . . . *disposal of low-level radioactive wastes." Pl's. Orig. Pet.* at ¶¶ 87-89 (emphasis added). Realizing that a removal action implicates issues of federalism, this Court finds that the Defendants timely removed the instant case to federal court after the Plaintiff filed its First Amended Petition which clearly limited the relevant market in the Plaintiff's antitrust action to the diaposal of DOE's mixed and low-level radioactive wastes.

III. CONCLUSION

Accordingly,

IT IS ORDERED Plaintiff's Motion for Remand is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Stay Consideration of Defendants' Motion to Dismiss Pending Deposition [*sic*] of Plaintiff's Motion to Remand, filed April 24, 1998, and Plaintiff's Amended Motion to Stay Consideration of Defendant's Motion to Dismiss Pending Disposition of Plaintiff's Motion to Remand, filed April 29, 1998, are hereby DENIED AS MOOT.

Signed this 25 day of May, 1998.

/s/ Honorable Lucius D. Bunton, III
HONORABLE LUCIUS D. BUNTON, III
Senior U.S. District Judge

APPENDIX D

[Filed June 25, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-98-CA-62

WASTE CONTROL SPECIALSTS, LLC,
Plaintiff,

v.

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.; KHOSROW B. SEMNANI; CHARLES A. JUDD; FRANK C. THORLEY, BILLY W. CLAYTON; AND NANCY M. MOLLEDA,
Defendants.

ORDER

BEFORE THE COURT, in the above-captioned cause of action, is Plaintiff's Motion for Reconsideration of Plaintiff's Motion for Remand, filed June 4, 1998. Also before the Court are Defendants letter brief responding to Plaintiff's Motion for Remand, Filed June 9, 1998; and Plaintiff's letter brief replying to Defendants' letter brief, June 10, 1998. After due consideration, the Court is of the opinion that the Motion should be denied.

Accordingly,

IT IS ORDERED Plaintiff's Motion for Reconsideration of Plaintiff's Motion for Remand is hereby DENIED.

SIGNED this 25 day of June, 1998

/s/ Lucius D. Dunton, III
HONORABLE LUCIUS D. DUNTON, III
Senior U.S. District Judge

APPENDIX E

[Filed Mar. 15, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50952

WASTE CONTROL SPECIALSTS, LLC,
Plaintiff-Appellant,

versus

ENVIROCARE OF TEXAS, INC.; *et al.*,
Defendants,

ENVIROCARE OF TEXAS, INC.; ENVIROCARE OF UTAH, INC.;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, Midland

(Opinion January 18, 2000, 5th Cir., 2000 ____F.3d_____)

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC

The appellees' ("Envirocare") Petition for Panel Rehearing is GRANTED. Part IV of the Opinion is withdrawn and the following section is substituted therefore. In all other

respects, the Petition for Panel Rehearing is Denied. Furthermore, no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is DENIED.

IV

Finally, we note that WCS has asked for the imposition of attorney's fees pursuant to 28 U.S.C. § 1447(c), which states in relevant part: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In this connection, the district court on remand shall decide, in the light of this opinion and other facts and evidence as may be relevant, whether the removal of this case was or was not objectively reasonable, and, thus, whether to enter an appropriate award of attorney's fees as provided in § 1447(c). *See Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290 (5th Cir. 2000).

APPENDIX F

[Filed Jan 18, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRUIT

No. 98-50952
D.C. Docket No. MO-98-CV-62

WASTE CONTROL SPECIALISTS, LLC
Plaintiff-Appellant

v.

ENVIROCARE OF TEXAS INC, *et al*
Defendants

ENVIROCARE OF TEXAS INC; ENVIROCARE OF UTAH INC;
KHOSROW B. SEMNANI; CHARLES A. JUDD;
FRANK C. THORLEY,
Defendants-Appellees

Appeal from the United States District Court for the
Western District of Texas, Midland.

Before REYNALDO G. GARZA, JOLLY, and WIENER, Circuit Judges.

JUDGMENT

This cause Came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is vacated, and the cause is remanded to the District court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the cost on appeal to be taxed by the clerk of this court.

ISSUED AS MANDATE: APR 04 2000